

**Submissions to Commissioner O'Connor
Commission of Inquiry into the Actions of Canadian Officials in relation to Maher
Arar**

I. INTRODUCTION

1. This inquiry is about Maher Arar, a Canadian citizen, a husband, a father of two young children, an engineer with a promising professional career whose life was dramatically and irrevocably changed due to circumstances which were completely outside of his control. On September 26, 2002, Mr. Arar was detained at John F. Kennedy airport in New York on his way back to Canada. Unbeknownst to him, Mr. Arar had become a person of interest in a national security investigation conducted by the RCMP because of a casual meeting with an acquaintance Abdullah Almalki. Based upon information which came from the RCMP, Mr. Arar had been put on a US terrorist lookout list. Prior to his arrival at JFK airport, the American officials made the decision that they were going to refuse Mr. Arar admission to United States based upon information that had been provided to them by the Canadians.

2. Before Mr. Arar arrived in the United States, an American official advised the RCMP of this decision and asked that they be provided with a list of questions for the purposes of interrogating Mr. Arar. The RCMP complied with this request, submitting the questions that they had compiled in preparation for an interview with Mr. Arar in Canada, an interview that did not take place because the investigators were unwilling to accept the conditions set by Mr. Arar's lawyer.

3. Mr. Arar was detained in the United States from September 26 to October 8, 2002. Although the treatment in the United States and the conduct of US officials is not before the Commission, there is clear evidence that Mr. Arar was detained in extremely harsh conditions and his access to counsel, to consular officials, and to contact with his family was extremely restricted.

4. On October 8, 2002, despite his protestations that he would be tortured, Mr. Arar was deported to Syria. For the next 10 months 10 days, Mr. Arar lived in the most deplorable conditions. He was held in darkness in a cell measuring 3 feet by 6 feet by 7 feet (3 x 6 x 7). During the first two weeks of his detention, he was brutally tortured and subjected to cruel interrogations and during the remaining period of his detention he was subjected to psychological torture and inhumane and deplorable conditions of confinement.

5. The entire experience has had a profound emotional and psychological impact on Mr. Arar. He suffers serious physical and emotional sequellae as a result of the torture and detention. It has affected his family life and the emotional well being of his wife, children and extended family. He has found it impossible to obtain employment. This in conjunction with the year he spent in detention when he was unable to work has significantly altered his family's economic well being.

6. While this inquiry raises issues of national and international importance we would urge the Commissioner to not lose sight of the fact that this inquiry is first and foremost about a man, husband and father who was subjected to horrific experiences. Before his

detention in the US, Mr. Arar was unaware that he was the subject of any investigation. He has never even been charged with, let alone convicted of, any criminal offence. Although it will be for the Commissioner to determine the degree of responsibility of Canadian officials in Mr. Arar's detention and deportation, there is no doubt that, had it not been for his causal meeting with Abdullah Almalki on October 12, 2001 and the subsequent decision of the RCMP to commence an investigation into Mr. Arar and to share information about him with US authorities, Mr. Arar would never have been deported to the Syria and subjected to the horrible treatment that he endured there.

7. However, the issues involved in this case transcend what happened to Mr. Arar. From his very first public statement he has maintained that he will never rest until he had done everything in his power to determine which officials were responsible for his treatment and to ensure that this never happens to anyone else. The national and, indeed, international attention that his case has received is testimony to the importance of this case.

8. The difficulty that Mr. Arar's counsel have in presenting these submissions emanate, first, from the terms of reference. The terms of reference require the Commissioner to only look at the role of Canadian officials in relation to Mr. Arar's detention in the United States, his deportation to Syria via Jordan, his imprisonment and treatment in Syria and his return to Canada. However, paragraph I-(v) permits the Commissioner to investigate and report on the actions of Canadian officials in respect of "any of the circumstance directly related to Mr. Arar that the Commissioner considers relevant to fulfilling his mandate." While it is

conceded that the terms of reference do not expressly invite the Commission to examine the actions of Canadian officials after Mr. Arar returned to Canada, it is submitted that these actions, particular in regard to the leaks of information to the Media, are matters that the Commissioner ought to inquire into and report on. The numerous leaks in this case show that some institutions of government, particularly the RCMP and perhaps CSIS were engaged in active efforts to discredit Maher Arar, turn the public mind against him by allegations of involvement in terrorist activities, undermine the public discussion as to the benefits of a public inquiry and ultimately deflect criticism that might be levelled at them. This conduct, on the part of some public officials, is evidence of both a clear disregard for their legal obligations under the *Security of Information Act* and a willingness to cause further significant psychological harm to Mr. Arar. In this context, the pattern of leaks is highly relevant in assessing the overall actions of Canadian officials and should clearly come within the Commissioner's mandate under paragraph I-(v) of the terms of reference.

Terms of Reference, para. I-(v)

9. Mr. Arar has yet to testify. The Commission owes Mr. Arar a duty of procedural fairness which in this case includes the obligation to provide him with as much disclosure of information relevant to his proposed testimony as possible. This duty arises because "his reputation and interests could be significantly affected positively or otherwise by the evidence called at the public hearings and possibly" the Commissioner's report. Whether this duty can ever be discharged with respect to Mr. Arar will have to await the release of the Commissioner's Interim Report. Technically the decision as to whether and when Mr. Arar will testify has been deferred by the Commissioner. However, the decision to defer his

testimony because of the inability to provide procedural fairness to Mr. Arar, does have an impact on the findings that can be made in the Interim Report. For example, Mr. Leo Martel, the Canadian Consul who visited Mr. Arar in Damascus, has made certain statements about when and what Mr. Arar said during consular visits, particularly the visit of August 14, 2003, and after his release from Syria when they travelled together back to Canada. It is submitted that one of the consequences of having ruled that Mr. Arar could not yet be called upon to testify is that no finding of fact can be made about whether Mr. Arar said or did not say that he was tortured or beaten during the early part of his detention in Syria during the August 14, 2003 consular visit. Until the Commissioner has heard Mr. Arar in respect of the discussions he had with Mr. Martel on August 14, 2003 and thereafter on the journey back to Canada, it would be unfair to Mr. Arar to make any finding accepting Mr. Martel's version of the conversations.

Ruling on Process and Procedural Issues, May 9, 2005

10. The Commissioner did rule, however, that the treatment Mr. Arar received in Syria and Jordan ought to be matters that he receives information about from Mr. Arar. In order to accommodate the concerns of procedural fairness and in recognition of the fact that this inquiry was called because of Mr. Arar's allegations of mistreatment and the shock Canadians felt, the Commissioner ruled that he would appoint a fact finder to report to the Commissioner about his treatment in Jordan and Syria. Unfortunately, the report of the fact finder will not be presented to the Commission and made available to Mr. Arar and his counsel prior to the date that these submissions must be filed. However, in light of the testimony of Leo Martel, the Consular official who saw Mr. Arar, and who stated that he

accepted Mr. Arar's description of his treatment in Syria as truthful, we are preparing these submissions on the stated assumption that while Mr. Arar was detained in Syria, he was a victim of abuse and torture during the first two weeks of his detention. His treatment by Syrian officials conforms to a pattern of treatment of other detainees that has been publicly documented. As a result, our submissions will proceed on the factual foundation that this misconduct occurred. As well, our submissions will assume as a fact that Mr. Arar faced conditions of confinement that were inhumane, degrading and which inflicted psychological torture upon him for the vast majority of time he was held by the Syrians.

Ruling on Process and Procedural Issues, May 9, 2005, p. 5

11. Commission counsel extended an invitation to the Governments of the United States, Syria and Jordan to participate in the inquiry proceedings. All refused or otherwise simply did not extend the courtesy of any reply. To the extent that adverse inferences can be drawn about the conduct of these governments or the public officials associated with them, it is our respectful submission that the Commissioner should have a no hesitation to do so in light of their refusal to participate.

12. Another issue of serious concern to Mr. Arar's counsel has been the overbreadth of the National Security Confidentiality (NSC) claims. While these submissions will not generally touch on this issue because it has been the subject of earlier motions and arguments, we wish to make some comments on this matter. The public record reveals important examples of the Government's over-broad claims of NSC where documents released pursuant to a request under the *Access to Information Act* had fewer redactions

than those provided to Mr. Arar by the Commission after they had been redacted by Government counsel at the Inquiry. For example, Mr. Leo Martel's first consular report contains a redaction immediately following the words in paragraph 7 when asked if he wished the Embassy to provide him with anything he might need [Mr. Arar] answered that "his needs were all taken care of by his Syrian hosts". This same redaction did not exist in documents produced to Mr. Arar through a request under the *Access to Information Act* which made it clear that the statement attributed to Mr. Arar was dictated by the Syrians. Obviously, the redaction made by the Government at the Inquiry is one that can be seen as inuring to the benefit of the Government of Canada and in the Government's interest. This raises the question of whether some redactions have been made not as part of a *bona fide* assertion of NSC, but rather for an improper purpose and in bad faith.

Exhibit P-42, tab 131
Exhibit P-134, tab 3

13. Another example of a redaction which raises this issue is found in the reported interview of Mr. Martel by an undisclosed Canadian official wherein Mr. Martel describes Mr. Arar's statements to him about the torture he experienced at the hands of the Syrian authorities. In all the other publicly released documents, that were either drafted or reviewed by Mr. Martel, he maintained that Mr. Arar never told him that he was beaten during the first two weeks of his interrogation. This portion of the document was not in the documents previously released and was not made available to Mr. Arar until half-way through Mr. Martel's testimony – the last witness at the public inquiry. The Government's explanation that the redaction in question was made not for any NSC reason but to protect

the privacy interests of Mr. Nureddin rings empty and hollow. It is submitted that this redaction again raises the very serious issue of information being withheld from Mr. Arar and the public for an improper collateral purpose.

Ruling on Process and Procedural Issues, May 9, 2005
Exhibit P-243
Exhibit P-242, tab 21

14. On May 30th, 2004, Mr. Arar filed a motion for disclosure of records in the possession of the government that contain or relate to information that was already in the public domain. Submissions on this motion occurred on July 5, 2004 and were dealt with by the Commissioner in his Ruling on Confidentiality issued on July 29, 2004. In his Ruling, the Commissioner held that he was not presently in a position to rule on the release of specific documents because he needed to hear evidence about the circumstances surrounding the government's production or receipt of documents. As well, the Commissioner held that he had not yet heard the evidence the Attorney General may wish to call in support the National Security Confidentiality claims. Furthermore, in this Ruling the Commissioner concluded that the fact that information is in the public domain is not necessarily conclusive of the issue he must consider under Section K(i) of the Terms of Reference. Ultimately, there was no ruling in favour of the motion made by Mr. Arar and his counsel. However, the Commissioner did state the following:

I agree that the fact that information contain in a document is in the public domain is an important factor in the assessment of whether disclosure of that document would itself be injurious to the elements of NSC. In other instances where privilege is sought, such as solicitor-client privilege and cabinet privilege, the fact that previous disclosure removes the privilege. That said, I do not think that the fact that the information is in the public domain is necessarily conclusive of the issue under Section K(i). Ultimately,

a test is always whether disclosure would be injurious element of NSC; however, it is a matter of common sense that previous disclosure will tend to significantly weaken if not defeat the claim that further disclosure would be injurious.

Ruling on Confidentiality, July 29, 2004

15. We wish to underscore the importance of the observations quoted immediately above. We ask that the Commissioner give careful scrutiny to the public record both at the Commission of Inquiry and also information disclosed in public statements of named and unnamed public officials to members of the Media when deciding what information is properly the subject of a national security confidentiality claim. In assessing the nature of any injury to National Security Confidentiality, the fact of prior publication should ultimately defeat all such claims examined pursuant to K(i), and (iii) of the Terms of Reference.

16. Furthermore, and in addition to the above submissions, we adopt and re-affirm the general submissions made on behalf of Mr. Arar in response to the Commissioner's request for written submissions in regard to the principles and limits to be imposed on claims of National Security Confidentiality. We ask that these be considered as the Commissioner approaches his task of determining what information can properly be disclosed in the interim report that it is intended to be made available to the public.

Submissions filed on behalf of Maher Arar, May 2004

17. In the Ruling on Confidentiality, the Commissioner noted the position of the Attorney General of Canada. He stated as follows:

First, counsel for the Attorney General, in her submissions, indicated that the government would make its best efforts to limit its NSC claims wherever possible. She also agreed that it would be inappropriate for the Attorney General to make NSC claims that were over inclusive, as a "first cut" for later negotiations with Commission counsel regarding the validity of such claims. I commend her for taking this position. In my view, that is the proper approach and counsel for the Attorney General should do everything she can to make sure that it is followed.

Despite this promise, the conduct of the government of Canada has been to the opposite effect. In considering what ought to be included in the public interim report, it is imperative to realize that many of the government's claims, particularly in the Public Inquiry phase, could only be regarded as over inclusive. On numerous occasions, an objection to important areas of evidence was made by counsel for the Government using the language "out of an abundance of caution we object". This language belies any narrow assertion of national security confidentiality and points directly to over broad assertions. One example of such an exchange is found in the testimony of Mr. James Gould on August 24, 2005. Counsel for Mr. Arar asked whether or not there were other cases where ISI or ISD had been the conduit for police information to foreign intelligence agencies. Ms Mclsaac objected to the question and stated as follows:

I'm sorry, sir, I have no idea what the answer would be, so I'm having some difficulty here. If it deals with other individuals, I have some difficulty, and out of an abundance of caution I have to say that if we are dealing with whether or not ISI or ISD facilitated the transfer of policing information to other police or security authorities in respect of other individuals, I would first argue that it is not relevant, and out of an abundance of caution I would have to take the position that we claim national security with respect to any answer relating to that.

Ruling on Confidentiality, July 29, 2004, p. 8
Testimony of Mr. James Gould, Transcript of Proceedings, August 24, 2005, p.
10398 - 10399

18. The assertion of claims of National Security Confidentiality had its impact, not only on whether Mr. Arar could be called to testify but also in respect of whole swaths of evidence that could not be examined in the public phase of the inquiry. Government counsel claimed NSC over any detail of the Project AOCANADA investigation. For example, the legality of the searches and seizures undertaken when Mr. Arar passed through the Canadian border from the US in late 2002 and the contents of his computer and palm pilot seized could not be assessed or challenged in the public hearings. Similarly, we were prevented from challenging the legality of obtaining Mr. Arar's lease from Minto Developments Inc. These warrantless searches are but two of the investigative mechanisms that was removed from scrutiny by the position of the Government of Canada. Obviously, in these circumstances, counsel for Mr. Arar is not in a position to make any submissions on the legality and/or constitutional validity of such searches and seizures. It is, however, noteworthy that on January 22, 2002, the RCMP executed search warrants in the Ottawa area and would have targeted the Arar premises if they had felt that there was reasonable and probable grounds to justify the search. This evidence is important as it raises serious questions about the lawful basis of any other search.

19. The government's position with respect to NSC claims also resulted in a decision by the Commission to abandon any effort to produce summaries of the evidence that was heard *in-camera*. Section k(ii) of the Terms of Reference of the Commissioner contemplates the production of such summaries as an important step in the inquiry process:

In order to maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received *in camera* and provide the Attorney General of Canada with an opportunity to comment prior to its release.

Ruling on National Security Confidentiality, December 20, 2004

20. After much negotiation, the Commission abandoned any efforts to reach an agreement on the first summary (relating to CSIS) and further abandoned any effort to produce further summaries. The effect of this course of action, which was precipitated by the government's objections, has been to deprive Mr. Arar of any indication of what the *in camera* evidence was. As a result, Mr. Arar can not make submissions about that evidence and the findings such evidence would support with respect to the conduct of Canadian officials. The absence of summaries is also at the root of why Mr. Arar could not receive procedural fairness sufficient to permit him to testify.

21. Lastly, in coming to a determination as to what ought to be disclosed to the public, we would remind the Commissioner of his own words. In the December 20, 2004 Ruling on National Security Confidentiality, the Commissioner made the important observation about the nature of a public inquiry and why the Executive Branch of government calls upon this vehicle to explore important issues. He stated:

In itself, the calling of a public inquiry is a significant event in the parliamentary democracy. Public inquiries are often called in the wake of a tragedy or a scandal. When the public's confidence and public officials or institutions has been shaken, the public's demand to know all of the details about what has occurred is often the catalyst for the calling of a public inquiry. Because a public inquiry is established to be independent of the government, it has the advantage of bringing to light, in an impartial and in an independent way, those facts that are necessary to assess the situation that triggered public concern. One of the great advantages of a public inquiry is

that it can expose all of the facts, many of which might not be revealed in normal public discourse.

At the request of the Government, this Inquiry has heard all the evidence *in camera*. Some unknown portion of the evidence was re-heard in public. As a result, the process of exposing to the public the facts so that the public can make its own evaluation has not occurred as fully as it has in other public inquiries. Therefore, a great burden falls upon the Commissioner to take all steps to maximize as much as possible disclosure of information which can be properly placed in the public domain and will inform the public in such a way that answers the fundamental questions which led to the Arar inquiry. The public has a right to know the answers to these questions and, much as possible, make its own decision about what happened to Maher Arar.

22. In light of the nature of the evidence and the fact that much of it has been subject to a NSC claim, it has been extremely difficult for counsel to approach many of the matters which are of concern to Mr. Arar. This difficulty has been exacerbated by counsel not receiving summaries of the *in camera* evidence, making it extremely difficult for Mr. Arar to address issues that are related in whole or in part to the evidence that was received *in camera*. Given these challenges, Mr. Arar's counsel has opted to take the following approach with respect to the submissions.

23. While the Commissioner cannot make findings of civil or criminal culpability, he is free to and must make findings of facts on all relevant matters, even if those facts, in another context, could give rise to a finding of criminal or civil liability.

24. Lastly, we wish to apologize for any repetition, duplication, typographical errors or other omissions that can found in these submissions. The short time available between the close of evidence and the deadline for these submissions challenge our abilities so that we could not edit and review these submissions as fully as we would otherwise have liked.

25. We have divided the submissions into four time periods:

- a) From October 12, 2001, when Mr. Arar became a subject of the investigation to September 25, 2002, when Mr. Arar was detained in New York.
- b) From September 26, 2002 to October 21, 2002 when the Syrian authorities confirmed Mr. Arar was in custody in Syria.
- c) From October 21, 2002 to October 6, 2003 when Mr. Arar returned to Canada.
- d) From October 6, 2003 until the Public Inquiry was called on.

26. With respect to each time period, counsel intend to identify the relevant actors of the Government of Canada that should be considered when assessing the role of Canadian officials. In addition, efforts will be made to identify the issues that should be considered by the Commissioner. Finally, counsel will review the public evidence that is relevant to each issue.

27. Given the lack of summaries and given the large amounts of information that has been subject to NSC claims, Mr. Arar's counsel will also, for the purposes of the submissions, rely on media reports filed in support of our initial disclosure motion or that have been filed. While we recognize that this approach is unusual, given the breadth of the NSC claims and given the importance of the issues, it would be unfair to Mr. Arar if we were not allowed to make submissions in this manner. To deny Mr. Arar the opportunity to make submissions based upon issues that are subject to the NSC claims before the interim report at this time would be to deny Mr. Arar the right to give his input into many important issues. In circumstances where we are relying on information that is public but is not part of the Commission record, we will clearly identify it. In these circumstances, we will not attempt to draw conclusions from that information but will merely pose questions that we believe ought to be considered by the Commissioner within the context of the preparation of his report.

II. PERIOD 1: INVESTIGATIVE STAGE – OCTOBER 12, 2001 TO SEPTEMBER 25, 2002

A. INTRODUCTION

28. The relevant officials of the Canadian government whose actions during this period should come under scrutiny by the Commissioner are:

- a) Canadian Security & Intelligence Service (CSIS), whose officials instigated the investigation into Abdullah Almalki and whose officials subsequently made the decision to transfer their files to the RCMP;

- b) The Royal Canadian Mounted Police (RCMP), including members of the AOCANADA Investigative Team who initiated and carried out the investigation and members from the Criminal Intelligence Directorate who were charged with supervising the AOCANADA investigation
- c) The Department of Foreign Affairs (DFAIT), including officials who met with members of the AOCANADA Team to discuss the investigation and Ambassador to Syria, Franco Pillarella.
- d) The Canadian Border Services Agency whose officials seized Mr. Arar's computer and palm pilot.

29. Counsel for Mr. Arar will address each of these different actors and make submissions with respect to the issues that emerge with respect to each agency or individual, the factual findings or conclusions we would urge upon the Commissioner, and any recommendations that we would request that the Commissioner make as a result of any conclusions reached.

B. THE ROLE OF CSIS

- (i) **Was CSIS' transfer of their intelligence file regarding targets that later became the targets of the AOCANADA investigation premature, inappropriate or ill-considered?**

30. As the Government has claimed NSC over most of the material in relation to this issue, we are unable to provide much guidance to the Commissioner on this issue. However, in considering whether the transfer was premature and/or inappropriate, we

would request that the Commissioner consider the following evidence which is on the public record before the Commission of Inquiry.

31. The decision by CSIS to transfer the target files was made within one month after the events of September 11, 2001. There is no evidence about whether target files prior to September 11, 2001 were transferred to the RCMP.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10734, 10739 - 10740

32. The two main targets transferred by CSIS that formed the basis of the Project AOCANADA investigation were Abdullah Almalki and Ahmad Abou El Maati. Due to NSC claims, when CSIS commenced an investigation into the activities of Mr. Almalki and Mr. El Maati was not allowed to be explored during the public phase of the inquiry. Mr. Almalki's chronology indicates that his first contact with CSIS began in the summer of 1998. Mr. El Maati's chronology describes his first contact with CSIS in April 2001. This information provides some context to the CSIS investigation.

Testimony of Inspector Mike Cabana, Transcript of Proceedings, pp. 9356, 9373
Abdullah Almalki chronology, p. 1
Ahmad Abou El Maati chronology, p. 1

33. It was in the context of the upheaval and threat environment post 9/11 that CSIS decided to transfer the files. Mr. Hooper acknowledged that CSIS had "taken it about as far as we could" with respect to their investigation.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10740, 10746

34. Mr. Hooper acknowledged that CSIS officials have a special skill set to conduct intelligence gathering and their expertise is different from RCMP officers. Mr. Hooper also acknowledged that a CSIS intelligence operation is different in its intent and scope from an RCMP national security investigation. The purpose of the former is to obtain intelligence. The purpose of the later is to obtain evidence for the purposes of a possible criminal prosecution.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10741 - 10742

35. The RCMP national security section was overwhelmed in the aftermath of 9/11. Therefore, most of the investigators assigned to AOCANADA had no experience dealing with a national security investigation, and only very limited experience or understanding of Islam and of the political movements associated with Islam. CID, which was supposed to provide centralized operational control over the national security investigation, was short-staffed and lacked experienced officers. Therefore, the AOCANADA investigation was not properly supervised or controlled.

Testimony of Gary Loepky, Transcript of Proceedings, July 27, 2005, p. 8391
Testimony of Sergeant Richard Flewelling, Transcript of Proceedings, August 23, 2005, pp. 9701, 9707, 9730, 9748-49, 9760-61
Testimony of Inspector Mike Cabana, Transcript of Proceedings, June 29, 2005, pp. 7824 - 7825, 7831 - 7833, 7836 - 7838

36. Four years have passed since the investigation was transferred to the RCMP and no charges have been laid with respect to the two main targets of the investigation, Mr. El Maati and Mr. Almalki. Mr. Arar has not been charged either. Clearly charges would be

laid if there were enough evidence to do so.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10741, 10744

37. Given the limited evidence now in the public domain concerning the nature of the CSIS investigation and the reasons behind the decision to transfer the files to the RCMP, we are unable to recommend any specific findings of fact in this regard. Nonetheless, given the importance of this initial decision to transfer the files of certain targets to the later developments in the case, we would urge the Commissioner to carefully review the full factual record to determine whether the decision by CSIS to transfer to the RCMP what appears to be a long standing and stagnant intelligence investigation, was fundamentally flawed.

38. The evidence before the Commission of Inquiry raises serious concerns about this initial decision. First, at the time of the transfer in the aftermath of 9/11, the RCMP was overwhelmed with demands and was ill-prepared and ill-equipped to undertake such an investigation. It did not have personnel with the investigative expertise in national security matters or in matters relating to alleged Muslim terrorists to be able to conduct an effective investigation. It did not have sufficient resources at the CID to supervise the Project and ensure that RCMP policies were complied with.

39. There appears to have been a long standing CSIS investigation into the actions of Mr. El Maati and Mr. Almalki which, prior to 9/11, had not yielded sufficient information to warrant a criminal investigation. Deputy Director Hooper acknowledged that they had taken

the investigation as far as they could. In such context, counsel has concerns that the decision to transfer the intelligence operation to the RCMP was an ill-conceived, hasty decision made without due regard to whether there was sufficient information to warrant converting the case into a criminal investigation. Given the different thresholds involved in commencing a CSIS investigation as opposed to an RCMP investigation, the Commissioner must clearly delineate the boundaries between the mandates of CSIS and the RCMP.

RECOMMENDATIONS

40. In the event that the Commissioner finds that the decision to transfer the file was ill-conceived, premature or inappropriate, then counsel for Mr. Arar would urge the Commissioner to recommend that CSIS establish clear criteria for when an intelligence investigation should be transferred to the RCMP for the purposes of gathering evidence with a view toward criminal prosecution.

(ii) What role, if any, did CSIS play in the investigation of Mr. Arar, given that he was not named in the “advisory letters” sent to the RCMP?

41. Former Deputy Commissioner Loepky testified that Mr. Arar was not one of the named referrals in the advisory letters sent by CSIS to the RCMP

Testimony of Former Deputy Commissioner Gary Loepky, Transcript of Proceedings, June 30, 2005, p. 8596

42. Beyond this information, we have not been privy to the interest CSIS had in Mr. Arar,

if any, during the time period leading up to Mr. Arar's detention in the United States. Deputy Director Hooper refused to confirm or deny any CSIS interest in Mr. Arar during his testimony at the Inquiry. However, there is evidence which suggests that CSIS did not have an interest in Mr. Arar up and until his arrest in the United States. This is consistent with the fact that his name was not contained in the advisory letters sent by CSIS to the RCMP.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10734 Exhibit P-103--Mr. Pardy's June 5, 2003 memo indicates that CSIS "...initially indicated it had no interest in Mr. Arar"
Testimony of Gary Loeppky, Transcript of Proceedings, July 27, 2005, p. 8596

43. CSIS continued to provide relevant information to the RCMP after they transferred the target files. Indeed, a CSIS agent was seconded to the project AOCANADA investigation. However, we have no knowledge whether any of the intelligence shared with the RCMP concerned Mr. Arar. We would request therefore that the Commissioner carefully review the *in camera* evidence concerning CSIS's role in the investigation and determine whether there is any evidence that CSIS conducted itself improperly during this stage of the investigation.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10749-50

44. On the basis of the Government's NSC claims, we were precluded from canvassing whether CSIS obtained information about Mr. Arar, either directly or indirectly from Syria during this period of time, and if so, whether this information was shared with the AOCANADA investigative team. This would include information about Mr. Arar contained in

Syrian reports or communications regarding the interrogations of Abdullah Almalki and Ahmad Abou El Maati.

45. Both Mr. Almalki and Mr. El Maati were detained in Syria. Canadian officials were aware of their arrest and detention in Syria before Mr. Arar's arrest in the United States. Mr. El Maati told consular officials during a consular visit in Egypt that he had been tortured during the time he was detained in Syria and he was forced to give false information. The chronologies of Mr. El Maati and Mr. Almalki provide further details of their experiences of torture and how, as a result, they provided false information, including information about Mr. Arar. Mr. El Maati indicated, during his interrogation by Syrian Military Intelligence in November 2001, that he concocted the story of a bomb plot to stop the torture. Mr. El Maati states that he was forced to tell his interrogators all of the Syrians he knew, including Mr. Arar, and that he was then tortured until he told the Syrians that he had seen Mr. Arar and Mr. Almalki in Afghanistan. The above references to the chronologies of Mr. Almalki and Mr. El Maati are not for the purpose of the truth of the contents of those chronologies. Rather, they provide contextual information that raises the serious issue as to whether CSIS and the AOCANADA investigators were in possession of information from the Syrians obtained under torture.

Exhibit P-192

Testimony of Myra Pastyr-Lupul, Transcript of Proceedings, July 29, 2005, pp. 8941 - 8951

Chronology of Abdullah Almalki, pp. 12 - 15, 17

Chronology of Ahmad Abou El Maati, pp. 7 - 10

46. In this regard, the Commissioner may also want to consider the information to obtain

a warrant to search Mr. Almalki's residence, sworn by AOCANADA Investigator Randal Walsh in January 2002, only two months after Mr. El Maati alleges he falsely confessed to a bomb plot in Ottawa. The information alleges that there is an Al-Qaeda terrorist "sleeper" cell operating in Canada and that the search warrant was necessary to collect evidence so that criminal charges could be laid. In the Information to Obtain, the officer requests a sealing order, in part because "information and material was obtained by the RCMP in confidence from CSIS and from several institutions of foreign states, such as the FBI, upon the express undertaking to them that their information would not be disclosed at this time, except in sealed court documents". Given the timing of the search warrants, and the fact that explicit reference is made to information and materials obtained from foreign sources, it is reasonable to surmise that the RCMP received the fruits of the El Maati interrogation prior to the date the information was sworn. This indeed is consistent with media reports which indicate that the Syrians helped the Americans avert a suspected plot against an American target in Ottawa.

Exhibit P-179, pp. 1, 98
Motion for Disclosure, Vol. 1, pp. 188-190

47. If information was shared by CSIS with the AOCANADA investigative team during this time period, the Commissioner must consider whether the information shared was obtained from foreign sources and whether the information shared was or might have been the product of torture or other mistreatment. We would request as well that the Commissioner carefully review the evidence to determine if CSIS officials had contacts with the Syrians and requested further information from them in a manner which might have resulted in further interrogations and possible torture of Canadian citizens. If the

information was not obtained directly from the Syrian authorities, the Commissioner must explore whether such information was obtained indirectly through the Americans or another foreign source. We further request that the Commissioner carefully review the evidence to determine, if information had indeed been passed onto the RCMP by CSIS, whether that information clearly indicated the source of the information and whether CSIS indicated that the information was of extremely doubtful reliability given that it came from a regime which was known to use torture during interrogations.

48. We request that the Commissioner also consider whether information was shared directly or indirectly by CSIS with Syrian authorities. Both former Director Ward Elcock and Deputy Director Hooper suggested that CSIS would only provide information to regimes that are known to engage in torture in “an absolutely extraordinary case”. The example given by Director Elcock involved an imminent threat of a bomb explosion in Canada. Deputy Director Hooper agreed with the former Director’s Elcock characterization that information would be shared with a foreign regime known to engage in torture only in an exceptional case but noted the bomb exploding example was just one example of an imminent threat and that an imminent threat could take on a variety of different forms.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10811 - 10812, 10118, 10821 - 10822

Testimony of Former Director of CSIS Ward Elcock, Transcript of Proceedings, June 22, 2004, p. 289

49. In this context, if CSIS did provide information to the Syrians, the Commissioner will first need to evaluate whether the information was shared in the context of an imminent

threat. According to the testimony heard during the public phase of the inquiry the investigation involved a strong international financial component relating to terrorism and the two main targets of the AOCANADA investigation were in jail in Syria and Egypt respectively. In this regard, the Commissioner must consider whether CSIS has any written criteria or guidelines for what would constitute an extraordinary case so as to justify sharing information with a foreign government that practices torture and, if so, whether these criteria strikes a proper balance between the needs to protect our national security and protection of the rights of individuals. To this end, we would request that the Commissioner take into account Canada's obligations both under the *Criminal Code*, the *Canadian Charter of Rights and Freedoms* and under international law which prohibit complicity in torture.

Testimony of Inspector Mike Cabana, Transcript of Proceedings, June 29, 2005, p. 7824

Khadr v. Canada, 2005 FC 1076

Jeff Sallot, "Torture tactics indefensible: Cotler", *Globe and Mail*, August 30, 2005
United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987

50. Counsel for Mr. Arar would also like the Commissioner to consider, if CSIS did provide information to the Syrians, whether prior to sharing this information there was any consideration of whether the sharing might place Mr. Arar or other Canadians at risk of torture. The accounts of Mr. Almalki and Mr. El Maati in their chronologies allege that information and questions used in their interrogations were supplied by Canadian authorities. Mr. Arar has made similar assertions with regard to his interrogations in the both Syria and the United States. Although we are in no way relying on the chronologies of

Mr. El Maati and Mr. Almalki as conclusive evidence that Canadian officials participated in these interrogations by providing questions or information to the Syrians, this information raises serious concerns about the role that Canadian officials may have played in these interrogations.

Abdullah Almalki chronology, pp. 10-11, 14, 18, 21-22, 24, 27-28, 29-30
Ahmad Abou El Maati chronology, p. 8
P-42, Vol. 8, Tab 693

RECOMMENDATIONS

51. We request that the Commissioner recommend that receipt of information by such regimes should only be undertaken in circumstances where it does not place a person held in custody at further risk of torture.

52. If the Commissioner concludes that CSIS provided information to the Syrians, we would urge the Commissioner to make a finding that there are no circumstances that would justify providing information to a regime known to engage in torture if that information relates to a Canadian citizen or residents.

53. If the Commissioner concludes that there might be exceptional circumstances in which information could be shared, we request that the Commission provide clear criteria that should be employed by CSIS when deciding what constitutes the extraordinary circumstances or imminent threat in which CSIS can share information with a regime that has a reputation for engaging in torture which takes into account Canada's obligations under domestic and international law.

- (iii) Was CSIS aware of the U.S. policy of extraordinary rendition and, if so, was this policy communicated to officials in the Department of Foreign Affairs? If it was not communicated, was this in error? If CSIS was not aware of the U.S. policy of extraordinary rendition, should they have been aware?**

54. Mr. Elcock, the former Director of CSIS, testified that he was aware of the U.S. policy of rendition but that it was his understanding that rendition involved forcibly bringing persons back to the United States to face justice. He acknowledged that he had read newspaper articles that referred to other forms of rendition but stated that these were merely allegations reported by newspapers.

Testimony of Ward Elcock, Transcript of Proceedings, June 21, 2004, pp. 163 - 164

55. Mr. Hooper similarly testified that he was aware in October 2002 of the policy of rendition but it was also his understanding that rendition involved bringing back persons to the United States.

Testimony of Deputy Director Operations Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10600

56. Mr. Commissioner will have to assess whether CSIS did know or ought to have known at the relevant time about the full extent of the U.S. policy of extraordinary rendition, which included sending individuals to third countries where they would be subjected to torture by proxy. There was an admission by Mr. Elcock during his testimony that he was made aware, through media reports, of renditions by the US of persons to third countries.

Mr. Elcock refused to acknowledge media and publicly available reports that document human rights abuses in Syria. His index of suspicion was far too low.

57. If the Commissioner finds that CSIS did know of this policy, then it is apparent that CSIS never advised any officials in the RCMP about this policy. Given the fact that CSIS was aware of the close co-operation between the RCMP and U.S. agencies in this case, this information ought to have been shared by CSIS with the RCMP. As well, CSIS never advised any officials in DFAIT about this policy. CSIS' mandate is to advise the Government of Canada about potential threats to the safety and security of Canadians. Advising the Government of Canada about the policy of extraordinary rendition, which foreseeably could impact on the treatment of Canadians, falls within that mandate.

58. If the Commissioner finds that CSIS did not have a full understanding of the policy of extraordinary rendition prior to Mr. Arar's deportation, we would submit that the Commissioner should find that CSIS should have been aware of this policy.

Exhibit P-122

Exhibit P-16

Exhibit P-120

Testimony of Julia Hall, Transcript of Proceedings, June 7, 2005, pp. 5568 - 5573

RECOMMENDATIONS

64. We would urge the Commissioner to make a recommendation that CSIS officials provide regular updates to the RCMP regarding important developments in the manner in which foreign intelligence agencies deal with national security matters.

65. With regard to the question of communicating policies and tactics used by foreign intelligence agencies which impact on Canadian citizens and might affect the handling of consular cases, we would request that the Commissioner consider recommending that guidelines be put into place to ensure that in the future there is a clear understanding about the need for effective communication by CSIS to DFAIT of information relevant to the handling of consular cases.

C. THE ROLE OF THE RCMP

66. The investigative steps taken by the RCMP with respect to Mr. Arar raises many questions that we think are important for the Commissioner to consider in his report. As a result of broad NSC claims it is difficult for us to make meaningful submissions regarding the investigative steps taken by the RCMP. Nonetheless, there is some public evidence before the Commission of Inquiry which is important for your consideration.

67. Mr. Arar first appeared on the RCMP radar screen on October 12, 2001 when he was seen meeting with Mr. Almalki at the Mango Café in Ottawa. Only five days later, on October 17, 2001, two AOCANADA officers were assigned to conduct extensive background checks on Mr. Arar.

Exhibit P-19, p. 61

Exhibit P-187, paragraph 17

Exhibit P-85, Vol. 4, tab 117, p. 7

Exhibit P-117, Vol. 2, tab 86, p. 3

Exhibit P-83, tab I, pp. 13 - 179, and tab 2, p. 17

Exhibit P-84, p. 117

Exhibit P-85, Vol. 1, tabs 26, 27, 28, 29 and 30

68. On October 30, 2001 an NSIS investigator from “A” Division, obtained a copy of Arar’s lease and rental application from Minto Developments Inc without a search warrant. Abdullah Almalki is indicated as an emergency contact number.

Exhibit P-84, p. 3, 111
Exhibit P-19, p. 67
Exhibit P-117, Vol. 2, tab 86, p. 4

69. On November 2, 2001, AOCANADA made a request for indices checks and other information known about Arar. The memo advised of a connection between Mr. Arar to Mr. Al Malki through the lease agreement (although the lease was not likely attached to the memo). The memo was later forwarded outside the RCMP without caveats/conditions.

Exhibit P-19, p. 6
Exhibit P-84, p. 111

70. On November 29, 2001, Mr. Arar entered Canada at McDonald-Cartier Airport in Ottawa on a return trip from Boston. He was detained for secondary inspection. This was deemed to be a legitimate business trip. Information obtained under Access to Information indicates that by this date Mr. Arar was on a Canadian terrorist watch list.

Exhibit P-83, Part II, p. 71
Exhibit P-19, p. 6
Exhibit P-174

71. On December 20, 2001, Mr. Arar entered Canada at McDonald-Cartier Airport. He was again detained for secondary inspection. BSA officials seized his lap-top and palm pilot. The RCMP were aware of the seizure by December 21, 2001 and the evidence

discloses that it is likely that the RCMP viewed or were given a copy of information contained on the palm pilot and/or computer.

Exhibit P-19, p. 7,
Exhibit P-83, Tab 1 p. 1
Testimony of Michael Edelson, Transcript of Proceedings, June 16, 2005, pp. 7250,
7400, 7352, 7357, 7366, 7402
Exhibit P-143

72. On January 10, 2002, the RCMP project managers met to discuss the execution of search warrants. Seven locations were identified for search warrants including Mr. Almalki's. Mr. Arar's home was to be the eighth location, if they had evidence to get a warrant. It was agreed that no reasonable and probably grounds existed in respect of Mr. Arar's premises and therefore no search warrant was sought or obtained for Mr. Arar's residence.

Exhibit P-140, tab 11, pp. 2-3
Testimony of Inspector Mike Cabana, Transcript of Proceedings, pp. 8281 - 8282

73. On January 22, 2002, two AOCANADA investigators, Constable Randy Buffam and a Corporal, attended Mr. Arar's residence to attempt to interview him. They were advised by his wife, Monia Mazigh, he was in Tunisia and would be returning in two or three days. Buffam left his business card and requested that Mr. Arar contact him upon his return to Canada.

Exhibit P-19, p. 8
Exhibit P-83, Part II, pp. 3-4, 211
Exhibit P-42, tab 573.01

74. Mr. Arar attempted to contact the RCMP the investigators while in Tunisia but was

unsuccessful. Upon his return the investigators contacted Mr. Arar by phone and attempted to set up a meeting with him. Mr. Arar then contacted a lawyer who contacted, Ms Alder, a legal advisor to Project AOCANADA. Mr. Edelson told Ms Alder that Mr. Arar would agree to an interview subject to certain conditions. The RCMP decided not to interview Mr. Arar. Inspector Cabana testified that such an interview would be pointless because the information could not be used as evidence in any subsequent proceeding. However, Deputy Director Hooper indicated that if CSIS passed on intelligence to AOCANADA it would have been in an inadmissible format and at no time did AOCANADA investigators indicate that they did not wish to receive such information because it was in an inadmissible format.

Exhibit P-140, tab 12, pp. 3 - 5

Testimony of Inspector Mike Cabana, Transcript of Proceedings, June 29, 2005, pp. 7896 - 7897

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10753 - 10755

75. In February 2002, somebody from a U.S. agency attended the offices of AOCANADA to review documents pertaining to Mr. Arar. The U.S. agency had opened an investigation into Mr. Arar's activities in the U.S. Mr. Arar's lease was likely given to this person, along with a package of other material (although AOCANADA investigators could not recall in November 2003 whether the lease agreement was passed on at this time).

Exhibit P-84, pp. 111 – 114

76. On March 20, 2002, an AOCANADA investigator completed a "Surveillance Package" for Arar.

Exhibit P-84, p. 30

77. Mr. Arar was discussed in an analysis plan for the project and at a presentation made by AOCANADA to the Ottawa Police Chief and others on April 3, 2002. On April 4, 2002, investigators were presented with an analytical chart on Mr. Arar. Discussion ensued on what investigative steps would be taken in respect of Mr. Arar. On April 18, 2002 a meeting was held to discuss requests in relation to a Chapters email, Mr. Arar's travel patterns and his employment history. On April 23, 2002 a presentation was made by AOCANADA investigators during which they discussed Mr. Arar, including persons who they identified as his contacts.

Exhibit P-140, tab 11, pp. 4 - 5

78. On June 19, 2002 an ICES Report for Mr. Arar, with his international travel history between January 1, 2000 and June 19, 2002, was created.

Exhibit P-85, Vol. 3, tab 81

79. On July 19, 2002, AOCANADA investigators asked Mr. Arar's landlord, Minto Developments, for his forwarding address. Personnel from Minto Developments Inc. phoned back to indicate that they had no forwarding address for Mr. Arar and no information on his whereabouts. Based on this and possibly other information the RCMP investigators concluded that Mr. Arar has left Canada permanently and speculated that his departure was the result of the investigation.

Exhibit P-84, p. 115

Exhibit P-117, Vol. 1, tab 25

Exhibit P-117, Vol. 2, tab 86, p. 15

Exhibit P-140, tab 11, p. 5

80. Although the Government of Canada claimed NSC over this issue there is information that in July or August 2002, RCMP AOCANADA officials went to Afghanistan and showed Maher's picture to Mr. Khadr. Mr. Khadr denied ever seeing Arar.

Testimony of Michael Edelson, Transcript of Proceedings, June 16, 2005, pp. 7456 - 7458

81. On August 15, 2002 the RCMP met with representatives of CSIS and DFAIT to discuss a consular report regarding Mr. El Maati in which he indicates that he provided false information to the Syrians under torture. The consular report also described details of Mr. El Maati's torture in Syria, specifically that the torture which included beatings to his feet and legs as well as being subjected to electric shocks all over his body.

Exhibit P-192
Exhibit P-211, p. 28

82. Five days later Sergeant Flewelling's personal notes indicate that Inspector Cabana "wants to invite the Syrians to review what Project AOCANADA has on [redacted] and provide them a series of questions they want the Syrians to ask [redacted] on our behalf."

Exhibit P-211, pp. 29-30

83. On September 10, 2002, Inspector Cabana meets with Ambassador Pillarella to discuss sharing information in his file on another Canadian detainee (presumably Mr.

Almalki) with the Syrians. Under cross- examination Inspector Cabana affirmed that he did not see this information sharing as being problematic despite being aware of the poor human rights record of Syria. Sergeant Lauzon, a member of CID, also indicated that he did not see information sharing with a foreign country with a poor human rights record as being problematic. This contrasts with the evidence of Director Elcock and Deputy Director Hooper of CSIS, who both indicated that information would be shared with such regimes only in the most extraordinary case.

Exhibit P-166, behind p. 44

Testimony of Mike Cabana, Transcript of Proceedings, August 23, 2005, June 29, 2005, pp. 8090 - 8091

Testimony of Ron Lauzon, Transcript of Proceedings, August 23, 2005, pp. 10180 - 10182

Testimony of Jack Hooper, Transcript of Proceedings, pp. 10811 - 10812, 10118, August 25, 2005, 10821 - 10822

Testimony of Ward Elcock, Transcript of Proceedings, June 22, 2004, p. 289

84. By September 26, 2002, the US had placed Arar's name on an American terrorist lookout list, based on information received from Canada as part of an ongoing general sharing of information between Canada and the U.S.

Exhibit P-18, p. 21

Exhibit P-124

Exhibit P-125

85. Prior to Mr. Arar's arrival in the US on September 26, 2002 the RCMP had already been advised by a U.S. agency of his arrival. This agency requested that the RCMP send a list of questions concerning Mr. Arar to them. The list was sent directly to the United States by Project AOCANADA and not through CID.

Exhibit P-140, tab 11, pp. 5-6
Exhibit P-19, p. 15

86. In addition to the chronology specific to Mr. Arar, other information is available on the public record before the Inquiry which is relevant to the evaluation of the conduct of the RCMP.

87. Deputy Director of Operations Hooper testified that CSIS intelligence officers possess a special skill set that takes years of training to obtain. He indicated that there was a difference between the skills required to conduct an intelligence as opposed to a criminal investigation. The evidence also discloses that the AOCANADA team was put together hastily after 9/11. Most of the RCMP officers did not have experience and training with respect to national security investigations and none of the officers had investigative experience with terrorist groups whose members might come from a Muslim background. Although there were a few officers with a Muslim background seconded for varying time periods to the AOCANADA team, the level of understanding of the Muslim custom was very limited as was the understanding of Al-Qaeda and the other related terrorist groups. This raises serious concerns about the level of sensitivity and expertise of the investigative team to deal with matters which were the subject of their investigation

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10741 - 10742

Testimony of Inspector Mike Cabana, Transcript of Proceedings, June 29, 2005, pp. 7824 - 7833, 7836 - 7838

Testimony of Gary Loeppky, Transcript of Proceedings, July 27, 2005, p. 8391

88. There is inconsistent evidence about the rules that were in place regarding sharing

information with foreign agencies during this period. Inspector Cabana indicated that it was his understanding that caveats were down. This was contradicted by the evidence of former Deputy Commissioner Loeppky, Deputy Director Hooper, Sergeant Flewelling and Sergeant Roy who all testified that there were no changes in the protocols to be used when sharing information with foreign agencies. Indeed Deputy Director Hooper expressed serious concerns about the potential breaches of caveats with respect to information that might have been provided by CSIS to the RCMP. He indicated that any such breaches of a caveat would be viewed seriously by CSIS.

Testimony of Mike Cabana, Transcript of Proceedings, June 29, 2005, pp. 7787, 8239

Testimony of Gary Loeppky, Transcript of Proceedings, July 27, 2005, p. 8407

Testimony of Rick Flewelling, Transcript of Proceedings, August 23, 2005, pp. 9718 - 9720, 9934 - 9936

Testimony of Ron Lauzon, Transcript of Proceedings, August 23, 2005, p. 10124

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10763 - 10764

89. There is also evidence on the record of the difficult relationship between members of Project AOCANADA and CID. The AOCANADA investigation was a National Security Investigation that was intended to be subject to supervision by the CID. The communications between CID and AOCANADA were strained and acrimonious at times. At the same time, CID itself was overwhelmed and did not have the necessary resources and experienced officers to effectively carry out its supervisory mandate during this time period.

Exhibit P-19, p. 71

Testimony of Gary Loeppky, Transcript of Proceedings, July 27, 2005, pp. 8392 - 8393

Testimony of Rick Flewelling, Transcript of Proceedings, August 23, 2005, pp. 9701,

9707, 9730, 9748 - 9749, 9760 - 9761

90. The above facts give rise to a series of questions concerning the investigative steps taken by the RCMP and we believe it is important for the Commissioner to make findings with respect to the following issues

- (i) **Did the RCMP have sufficient grounds on October 12, 2001 to make Maher Arar a “person of interest”? What is the definition of a “person of interest”? What is the appropriate threshold for making someone a “person of interest”? Should these terms be uniformly defined in the policing community? What is the threshold for starting an investigation in light of “intelligence led policing” where a crime has not yet occurred? At what point is it appropriate to share information regarding a person of peripheral interest with a foreign intelligence agency?**

91. We may not be privy to all of the information that was in the possession of the RCMP regarding Mr. Arar at the time it was decided that he was a “person of interest” to Project AOCANADA. Nonetheless, one meeting between Mr. Arar and Mr. Almalki cannot be enough to make Mr. Arar a “person of interest” in the investigation. In light of this, the Commissioner must carefully scrutinize all of the evidence and determine whether there was any other evidence to warrant making Mr. Arar a “person of interest” in the AOCANADA investigation. If there was not sufficient evidence to warrant including Mr. Arar in the investigation at this time, any subsequent investigative steps undertaken were not justified.

92. Even if there was sufficient information to make Mr. Arar a “person of interest”, a higher threshold must be met before intelligence information concerning a Canadian citizen

is shared with a foreign agency. In this regard, we would request that the Commissioner consider whether Project AOCANADA had sufficient information to justify sharing of information about Mr. Arar with their US counterparts. The decision to share information with a foreign intelligence agency regarding a resident of Canada must be based on a series of factors, including the human rights record of the receiving state, the importance of the information to that state, the relevance of the information, the purpose for which the information will be used, and the importance of the person to the investigation. As stated previously in the CSIS section of our submissions, Canada should not provide information to regimes with a poor human rights record in any circumstances. Even in cases where the human rights record is acceptable, information should only be shared in circumstances where the sharing will contribute in some important fashion to an ongoing investigation.

93. At this point we think it is important to highlight another fact. The AOCANADA team was working closely with the FBI, an organization which has not been traditionally viewed as an intelligence agency. However, in the post 9/11 era, the distinction, especially in the US between organizations involved in criminal investigations and those involved in intelligence gathering in relation to “terrorist” related activities has become blurred. Therefore, when considering the advisability of sharing of information with “foreign intelligence agencies”, the sharing of information with the FBI should have been governed by the rules used for sharing intelligence information with foreign governments.

RECOMMENDATIONS

94. We would request that the Commissioner recommend that guidelines be developed

regarding the sharing of information by the RCMP with foreign intelligence agencies, which would take into account, the human rights practices of the foreign governments, whether or not the government is complicit either directly or indirectly in the use of torture and other relevant information. Such guidelines should consider the extent to which the information available provides evidence as to the involvement of the person in terrorist activities. The more limited the evidence the more stringent should be the controls placed on the sharing of such information.

95. We would also urge the Commissioner to consider making a recommendation that in all cases where the RCMP shares information with a foreign intelligence service within the context of a national security investigation, that such sharing be subject to scrutiny and review but the independent oversight mechanism which will be created after the Commissioner releases his report.

(ii) Did the RCMP engage in racial profiling on October 12, 2001 when they started to investigate him as a person of interest?

96. A topic which is clearly related to the above concerns is whether Mr. Arar was the victim of racial profiling. Simply put, if Mr. Arar came to the RCMP's attention as a result of one meeting on October 12, 2001 with another Muslim man, the Commissioner must consider whether this was sufficient and adequate evidence to justify further investigation or whether Mr. Arar the victim of racial profiling. In this regard, a central consideration for the Commissioner is whether Mr. Arar would have become a person of interest to Project AOCANADA if Mr. Arar was not a Muslim of Arab descent, or if Mr. Almalki was not a

Muslim of Arar descent.

97. In a Criminal Intelligence Brief dated September 18, 2001 sent by Wayne Pilgrim to undisclosed members of the RCMP, it speaks of the law enforcement requirements to combat terrorism and outlines the long-term strategy to deal with potential future attacks. In the brief, there is an alarming description of the “adversary” the RCMP is up against:

This longer term strategy will have to take into account the type of adversary we are up against. By all accounts the hijackers of the four planes were men who had lived in the United States for some time, did not act conspicuously, were well spoken, well dressed, educated and blended in with the North American lifestyle. Similar subjects live in Canada and some have been identified through the [redacted] investigation. These identified individuals travel internationally with ease, use the Internet and technology to their advantage, know how to exploit our social and legal situation and are involved in criminal activities.

Inspector Mike Cabana testified that implicit in the above description is Arab/Muslim and that many Arabs and Muslims would fall into the above category of potential adversaries. Exhibit P-85, Vol. 5, tab 23, p. 3
Testimony of Mike Cabana, Transcript of Proceedings, pp. 8186 - 8187

98. Inspector Cabana further testified that, as far as he is aware, there is no specific training that deals with Muslim culture, although there are some cross-culture training programs. Former Deputy Commissioner Gary Loeppky testified that there was a section of cross-culture training as part of the national security training course.

Testimony of Mike Cabana, Transcript of Proceedings, June 29, 2005, p. 7837 - 7838
Testimony of Gary Loeppky, Transcript of Proceedings, July 6, 2004, p. 1447

99. If the Commissioner finds that Mr. Arar would not have become a person of interest to the AOCANADA investigators but for the fact that he is a Muslim of Arabic descent and he is a well-spoken, highly educated engineer, then the Commissioner ought to find that Mr. Arar was a victim of racial profiling.

RECOMMENDATIONS

100. We request that the Commissioner make a clear statement that racial profiling violates the Canadian Charter of Rights and Freedoms and is prohibited.

101. We request that the Commissioner recommend the creation of training around the question of racial profiling which would be mandatory for all persons engaging in national security investigations regarding groups which are connected to racial or religious groups.

(iii) Were the RCMP engaged in an intelligence investigation prior to December 2001? If so, under what legal authority were they engaged in such an investigation?

102. In considering this issue, the Commissioner should be cognizant of the different mandates of CSIS and the RCMP and may want to consider whether the RCMP was acting within its mandate. Former Deputy Commissioner Loeppky testified that the RCMP is not authorized to conduct pure intelligence investigations.

Former Gary Loeppky, Transcript of Proceedings, p. 8698

103. In the minutes of the December 19, 2001 meeting of Project AOCANADA, states as

follows:

“Until now, the impetus of their investigation has been an intelligence gathering exercise, but it will now shift to a criminal investigation so that detailed information can be gathered in a manner suitable for court purposes.”

This document seems to indicate that prior to this time the investigation was an intelligence gathering operation which falls within the mandate of CSIS, not the RCMP.

Exhibit P-83, Part I, p. 2

104. The difference between intelligence gathering and criminal investigations was studied carefully by the MacDonald Commission which noted the difficulties that can occur when these two mandates are merged. While we are aware that the RCMP has a role to play in preventing crime, there is a significant difference between a criminal and intelligence investigation. It is important that there be a clear delineation of the different mandates of CSIS and the RCMP in respect of national security investigations. These mandates should remain discrete.

Exhibit P-5

RECOMMENDATIONS

105. We request that the Commissioner recommend that clear guidelines be established which distinguish between the respective roles of CSIS and the RCMP in relation to National Security Investigations.

(iv) Should there be a targeting committee within the RCMP similar to the

committee that exists within CSIS?

106. Mr. Arar has variously been called a “person of interest”, a “potential witness”, a “subject of interest”, and a “peripheral subject of interest”. Inspector Cabana admitted that these labels are not well-defined by the RCMP. He also indicated that Mr. Arar was a person of interest to the AOCANADA investigation and that they wanted to speak to him as a potential witness.

See for instance, P-184, P-117, Vol. 1, Tab 25, P-83, Part III, p. 8
Testimony of Mike Cabana, Transcript of Proceedings, June 30, 2005, pp. 8304 - 8305

107. In contrast, Mr. Hooper testified that there would be no confusion over labels in a CSIS investigation; a person is either a target or not a target. Mr. Hooper further testified that the targeting committee involves a rigorous process that results in clearly defined targets and clearly defined investigative techniques that can be used in a particular investigation.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10748 - 10749

108. While we are aware that there is a difference between an intelligence operation and a criminal investigation, it is also apparent that in the post 9/11 era these distinctions are less obvious and that for the protection of individuals who might get caught up in a peripheral way in a national security investigation involving the RCMP, it is important that there be a clear understanding of the level of interest that the RCMP has in an individual. Indeed, in the context of Mr. Arar’s situation, it would have been extremely important for it

to be made clear to both the US and Syrian authorities what degree of interest the RCMP had in Mr. Arar, namely that he was merely a witness.

109. In September of 2002, when the US agencies requested information about Mr. Arar, the RCMP did not have any evidence to suggest he was linked with Al-Qaeda or involved in terrorist activities. Inspector Mike Cabana testified that Mr. Arar was a potential witness and, as of February 2003 when Inspector Mike Cabana left Project AOCANADA, Mr. Arar was not a suspect in their investigation. On this basis, the Commissioner ought to make the following findings of fact:

- a) Mr. Arar was not a target of the Project AOCANADA.
- b) There is no evidence before the Commission that Mr. Arar is or has been involved terrorism.
- c) There is no evidence before the Commission that Mr. Arar is or has been connected with Al-Qaeda.

Exhibit P-172

Testimony of Mike Cabana, Transcript of Proceedings, June 30, 2005, pp. 7890, 7915, 7930, 8179 - 8180

110. The Commission must make findings of fact as to whether the lack of clarity in terms of the level of interest in Mr. Arar contributed to his deportation to Syria, to his detention in Syria and to the delay of his release from Syria.

RECOMMENDATIONS

111. We request that the Commissioner recommend that a targeting committee be

created for RCMP national security investigations.

112. We request that the Commissioner recommend that the RCMP adopt clear language when describing the level of interest that they have in a person who has somehow become caught up in a national security investigation.

- (v) **Did the RCMP put Mr. Arar on a watch list? Did the RCMP have sufficient information to put Mr. Arar on a watch list? What is or should be the threshold for taking such an investigative step? Was it met in this case?**

113. The only evidence on the public record with respect to Mr. Arar potentially being on a watch list can be found in a printout of Mr. Arar's travels between September 12, 2000 and January 24, 2002 which contains the notation "terrorism" on certain entries. It therefore appears that sometime after October 26, 2001 but before November 29, 2001, Mr. Arar was labelled as a terrorist suspect.

Exhibit P-174, p. 2

115. There is also evidence that Mr. Arar was on the US terrorism watch list prior to September 26, 2002. The government has claimed NSC over any information that might explain the significance of the 'terrorism' notation in this list. Nonetheless, there can be no doubt that this indicates that Mr. Arar was the subject of suspicion and that he was singled out for extra scrutiny when he entered Canada. This issue takes on even greater significance in light of the fact that the Minister of Transport has recently announced the intent to create a 'no fly list' in Canada.

Exhibit P-124

Exhibit P-125

Public Safety and Emergency Preparedness Canada: “Government of Canada moving Forward on Air Passenger Assessment”,
www.psepc.gc.ca/publications/news/2005/20050805-1_e.asp

114. If Mr. Arar was placed on a Canadian watch list, we do not know who made that decision, CBSA, RCMP or CSIS. As we are not privy to the *in camera* evidence, we also do not know what information was relied upon or what criteria, if any, were employed to make the decision that Mr. Arar should be put on the watch list.

115. We ask the Commissioner to carefully scrutinize the evidence to determine whether there was sufficient information to justify such a step and whether the criteria used to make this determination was reasonable in light of the potential consequences to the individual.

RECOMMENDATIONS

116. We would request that the Commissioner recommend the creation of clearly defined criteria to be used when deciding whether or not a person should be put on a watch list.

117. We would further request that the Commissioner recommend that an independent oversight body be set up which would allow for external review of decisions to place a Canadian on a watch list, with a mechanism for people to challenge the inclusion of their name on such a list and request the removal of their name from the list.

118. We would request that the Commissioner recommend that decisions to place

persons on watch lists be subject to periodic review by an independent oversight body which will require that individuals be removed from the list unless there is a demonstrated need that they continue to be kept on the list.

(vi) Were the methods used by the RCMP in their investigation of Mr. Arar lawful and/or appropriate in the circumstances?

119. We will be making submissions on specific investigative techniques that we know were employed by the RCMP below. However, because of the Government's broad NSC claims, we likely do not have full disclosure of the steps taken with respect to Mr. Arar. As such, we would request that the Commissioner explore the lawfulness and/or constitutional propriety of any such methods.

(vii) Did the RCMP have lawful authority when they obtained Mr. Arar's lease without a proper search warrant? Was the seizure lawful and/or reasonable?

120. On October 30, 2001, only two weeks after Mr. Arar was first seen by AOCANADA investigators, copies of Arar's lease and rental application from Minto Developments Inc were obtained by an "A" Division officer. These documents were obtained without a proper search warrant and, unless the Commission has heard *in camera* evidence to the contrary, without any legal authority.

Exhibit P-84, p. 3, 111
Exhibit P-19, p. 67
Exhibit P-117, Vol. 2, Tab 86 (pg. 4)

121. Indeed, one of the conclusions Chief Superintendent Garvie reached in his report was that the tenancy agreement and rental application should have been obtained with a search warrant issued pursuant to the *Criminal Code*.

Exhibit P-19, p. 67

122. The conduct of the investigator is simply unacceptable. In our submission, we have a legal process put in place that requires an officer to satisfy a justice that reasonable and probable grounds exist to justify the issuance of a search warrant and investigators can not side step this legal process to obtain documents from a third party. Section 8 of the Charter mandates this protection.

123. In this regard, it is important to note that the AOCANADA investigators concluded that they did not have sufficient evidence to seek a search warrant for Mr. Arar's home in connection with the January 22, 2002 raids. If this is the case, it is reasonable to assume that they did not have sufficient evidence to obtain a search warrant in October of 2001.

Testimony of Inspector Mike Cabana, Transcript of Proceedings, June 30, 2005, pp. 8281 - 8282

124. We therefore request that the Commissioner carefully scrutinize the evidence to determine whether the investigators obtained Mr. Arar's lease without lawful authority. In addition we would request that the Commissioner determine whether the decision to obtain the lease without a warrant was made in bad faith and to circumvent the normal judicial safeguards that are part of the process of obtaining a search warrant.

(viii) Did the RCMP view Mr. Arar’s computer and palm pilot that were seized by the CBSA? Was there lawful authority for this seizure?

125. Mr. Arar’s computer and palm pilot were seized at the airport on December 20, 2001 and were only returned to him the next day. Mr. Edelson testified that he was contacted by Mr. Arar after he had reclaimed his computer and palm pilot. Mr. Arar noticed that his computer had been logged into after the seizure and that there was a significant decline in the power on his laptop (by 16%) indicating that it had been more than just simply turned on & off again.

Testimony of Michael Edelson, Transcript of Proceedings, June 16, 2005, pp. 7250, 7400
Exhibit P-143

126. A notation by a customs official indicates that the computer and palm pilot were held for a “possible view by NSIS”. In our submission, there would have been ample time for the hard drives of both the palm pilot and computer to be mirrored before they were returned to Mr. Arar on December 21, 2001.

Exhibit P-175, p. 2

127. It is also on the public record that as of December 21, 2002, AOCANADA investigators were aware that Mr. Arar’s laptop computer and palm pilot had been seized by customs agents.

Exhibit P-83, Tab 1, p. 1

128. In a meeting with AOCANADA investigators, Mr. Edelson was told that Mr. Arar was of interest to the RCMP in part because the names of other persons of interest were on Mr. Arar's palm pilot.

Testimony of Michael Edelson, Transcript of Proceedings, June 16, 1005, pp. 7352, 7357, 7366, 7402

129. In addition, it is apparent that this same investigative technique was used in the case of Mr. Almalki. In the Walsh affidavit, it is noted that Mr. Almalki's hard drive was copied without his knowledge at Dorval Airport.

Exhibit P-179, p. 52

130. Perhaps the most explicit indication that the RCMP mirrored or received a copy of Mr. Arar's hard drive is contained in the personal notes of Sergeant Flewelling. In an entry dated March 21, 2003, he wrote "Maher ARAR's hard drive analysis."

Exhibit P-211, p. 58

131. Based upon the above evidence, the Commissioner ought to find that the RCMP viewed or were given a copy of the information contained on Mr. Arar's palm pilot and laptop computer. Moreover, we ask the Commissioner to find that no warrant was obtained to authorize the search of either the Palm Pilot or computer.

Testimony of Inspector Mike Cabana, Transcript of Proceedings, June 30, 2005, pp. 8281 - 8282

132. In our submission Chief Superintendent Garvie's comment with respect to the

requirement that the RCMP obtain the lease with a proper search warrant would be equally applicable to the seizure of Mr. Arar's palm pilot and laptop computer, namely, the RCMP would be in contravention of the law if they viewed or obtained a copy of Mr. Arar's palm pilot and laptop computer without a search warrant pursuant to the *Criminal Code*. In our respectful submission all RCMP investigators must obey the provisions of the *Criminal Code* which requires officers, in the absence of very exceptional circumstances outlined in the Code, to obtain a search warrant prior to seizing a computer and viewing its contents.

(ix) Was the RCMP in possession of information obtained from the interrogations of Mr. El Maati or Mr. Almalki which may have been the product of torture and, if so, did the RCMP rely upon this information in their investigation of Mr. Arar without an adequate assessment of the reliability of the information? Similarly, was this information used to support the January 22 search warrants?

135. We are unable to provide the Commissioner with a great deal of assistance on this issue because the Government of Canada has claimed NSC over this material. However, there is some contained in the public record before the Commission as well as information disclosed by the Media. As a result we can make some submission in regard to this issue.

136. As outlined above, the chronologies of Mr. Almalki and Mr. El Maati suggest that both men were detained in Syria and subject to torture and interrogation. Both provided information to the Syrian authorities as a result of their torture. It is not clear whether the RCMP received copies of or information from their interrogations. Exhibit P-192

Testimony of Myra Pastyr-Lupul, Transcript of Proceedings, July 29, 2005, pp. 8941

Chronology of Abdullah Almalki, pp. 12-15, 17
Chronology of Ahmad Abou El Maati, pp. 7-10

137. We also know from the public record before the Inquiry that the RCMP liaison officer travelled to Syria in January 2002 in order to obtain information in furtherance of their investigation of Mr. El Maati and that on July 16, 2002, Inspector Cabana met with Inspector Covey, the RCMP Liaison Officer accredited to the region encompassing Syria and Egypt to discuss efforts made by Covey to gain access to an individual being detained abroad. Inspector Cabana then spoke with Superintendent Watson who indicated that it would be appropriate to share information with the Syrians.

Testimony of Ambassador Franco Pillarella, Transcript of Proceedings, June 14, 2005, pp. 6742 - 6743
Exhibit P-166, pp. 40 - 41

138. Having heard the *in camera* evidence, Mr. Commissioner will be in a position to assess whether the RCMP did obtain information emanating from the interrogations of Mr. El Maati, either directly from the Syrians or indirectly via CSIS or another agency, and, if so, whether this information constituted the information from foreign sources which was used to support the Walsh Information to Obtain (ITO) for the January 22, 2002 search warrants.

139. We ask that the Commissioner scrutinize the information presented before the issuing Justice who authorized the search warrants to determine whether or not the reference to reliance on information and material from foreign sources refers to information emanating from the interrogation of Mr. El Maati in Syria. If there was such reliance on this material, it is important to examine whether the Walsh ITO explicitly discloses the source of the information and whether Corporal Walsh makes reference to fact that the information

may be the product of torture as it comes from a country who is notorious for using torture during interrogations. In our submission, if no such disclosure took place, this amounts to a fraud having been perpetrated on the issuing Justice.

140. With regard to the receipt and sharing of information by RCMP with the Syrians during this time period, we would request that if such information sharing did occur that the Commissioner carefully scrutinize it to determine if information was obtained from foreign sources or via CSIS and the extent to which the information that was shared could have been the product of torture. We would request as well that the Commissioner carefully review the evidence to determine if there is anything to suggest that the RCMP officials had contacts with the Syrians and requested further information from them in a manner which might have resulted in further interrogations and possible torture of Canadian citizens. We would also request that, if the information was not obtained directly from the Syrian authorities or indirectly through CSIS, the Commissioner explore whether such information was obtained indirectly through the Americans or another foreign source.

141. The above submissions dealt with the receipt of information from foreign countries that have poor human rights records but we would request that the Commissioner also consider whether information was shared directly or indirectly by RCMP with Syrian authorities.

142. Documents disclosed during the inquiry indicate that the RCMP were interested in sharing information with the Syrians and gaining access to see Mr. Almalki during this time.

Sergeant Flewelling's personal notes disclose conversations regarding Mr. Almalki in June 2002. In a meeting on June 21, 2002 with Mike Cabana and others, Mr. Flewelling notes of the meeting indicate the following:

Solicit the assistance of CSIS, LO Rome & DFAIT to apply the necessary pressure in an effort to gain access. Questions: [intell.] versus criminal. Do we want him back. Do we have enough to charge. A Division would really want him back for the purposes of laying charges under Bill C-36. The question is really how is Syria going to play... We may have to [illegible] and be satisfied with the prevention side of the mandate and hope that additional information can be gleaned with respect to – his plan – other plans we are not aware of – other individuals or groups etc..."

Exhibit P-211, p. 21

143. A meeting was held on August 15, 2002 at RCMP headquarters to discuss the statements made by El Maati that he was tortured during his detention in Syria. Only five days later, despite Mr. El Maati's statements that he had been tortured in Syria, Sergeant Flewelling records the following in a phone conversation in his person notes:

XXX called to advise a fax in my name was en route. He also advised that Mike Cabana still wants to invite the Syrians to review what Project AO Canada has on XXX and provide them with a series of questions they want the Syrians to ask XXXX on our behalf"

Exhibit, P-211, pp. 28 - 29

144. The issue of sharing information with the Syrians was again raised at a September 10, 2002 meeting between AOCANADA investigators and Ambassador Pillarella. The Ambassador was informed that information packages had already been prepared.

Exhibit P-166, p. 44 and newly inserted page behind page 44

145. Moreover, the chronologies of Mr. Almalki and Mr. El Maati raise very serious allegations that some of the information used to interrogate them came from Canadian sources

Abdullah Almalki chronology, p. 18
Ahmad Abou El Maati chronology, p. 8

146. In cross-examination with respect to sharing information with foreign sources, Mr. Gould from ISI testified that in his experience you need to be prepared to give in order to receive information from a foreign source. This sentiment was also expressed by Mr. Pillarella in the September 12, 2002 meeting. We would submit that the public record gives clear indications that the RCMP may have shared information with Syrian military intelligence and we can therefore assume that the RCMP was similarly in receipt of information from Syrian military intelligence during this time. We would request that the Commissioner address in his report whether information emanating from the interrogations of Mr. El Maati and Mr. Almalki was received by the RCMP, whether a reliability assessment of this evidence was conducted by the RCMP and whether this information was used in any way in the investigation of Mr. Arar.

Testimony of Jim Gould, Transcript of Proceedings, pp. 10434 - 10435
Exhibit P-166, newly inserted page behind page 44

147. Of even greater concern to Mr. Arar were the statements of Inspector Cabana and Sergeant Lauzon to the effect that they saw nothing wrong with providing information to Syria notwithstanding their awareness of the human rights record. Their justification that the

needs of their national security investigation outweighed the concerns that might arise as a result of the sharing of information is unacceptable in our submission.

Testimony of Inspector Mike Cabana, Transcript of Proceedings, pp. 8091 - 8092
Testimony of Sergeant Ron Lauzon, Transcript of Proceedings, pp. 10179 - 10181

RECOMMENDATIONS

148. If the Commissioner concludes that RCMP was in receipt of information from the Syrians emanating from the interrogations of Mr. El Maati or Mr. Almalki, either directly or indirectly, we would request that the Commissioner consider making recommendations regarding the sharing of information by the RCMP with regimes that have a reputation for engaging in torture. We would request that the Commissioner recommend that receipt of information by such regimes should only be undertaken in circumstances where it does not place a person held in custody at further risk of torture.

149. If the Commissioner concludes that RCMP provided information to the Syrians, we would urge the Commissioner to make a finding that there are no circumstances that would justify providing information to a regime that has a reputation for engaging in torture. If the Commissioner concludes that there might be exceptional circumstances in which information could be shared, we request that the Commission provide clear criteria that should be employed by the RCMP when deciding what constitutes the extraordinary circumstances or imminent threat in which the RCMP can share information with a regime that has a reputation for engaging in torture which takes into account Canada's obligations under domestic and international law.

- (x) Did the RCMP receive information from the US about Mr. Arar? If so, when and under what circumstances? Was the sharing of information appropriate in the circumstances?**

150. The Government of Canada has claimed NSC over all of the evidence that may be relevant to answering this question so we do not know if the RCMP was in receipt of information emanating from US sources during this period. As in the case of any other information that might have been received from a foreign agency, we would request to the extent that such information was received, the Commissioner consider whether or not there was proper reliability assessments done with respect to the evidence.

- (xi) Did the RCMP breach caveats and protocols when they shared information with the United States without caveats and without restrictions? Did the RCMP breach caveats and protocols when they shared the fruits of the search of January 22nd with the FBI without caveats or protocols?**

151. In our submission, it is clear from the evidence on the public record that AOCANADA investigators breached RCMP policies with respect to foreign information sharing.

a) Caveats

152. There is conflicting evidence about the policies and agreements that were in place regarding the sharing of information with American partners in the AOCANADA investigation. Inspector Cabana testified that he had been told that caveats are down early on in the project and that these were the instructions he had received from his superiors and from Headquarters. Former Deputy Commissioner Loeppky, Sergeant Flewelling and Sergeant Lauzon testified that there was never any change with respect to RCMP policy in

this regard. Former Deputy Commissioner Loeppky stated that message communicated after 9/11 was information would be shared quickly and fully but within the existing policy. All the RCMP witnesses were in agreement that there was never any written agreement or policy stating that caveats were no longer required in this investigation. While Mr. Proulx, whose evidence was heard *in camera*, is the person said to have given the verbal instruction that caveats are down, we ask the Commissioner to find that no such order was authorized or issued and that AOCANADA investigators acted irresponsibly by deviating from RCMP policy. Indeed, we ask the Commissioner to find that there were “rogue elements” in the RCMP who lacked proper supervision and oversight of their investigation and acted in utter disregard for the potential consequences of such breaches.

Testimony of Mike Cabana, Transcript of Proceedings, pp. 7787, 8239

Testimony of Gary Loeppky, Transcript of Proceedings, pp. 8401, 8407, 8729

Testimony of Richard Flewelling, Transcript of Proceedings, pp. 9718 - 9720, 9934 - 9936

Testimony of Ron Lauzon, Transcript of Proceedings, p. 10124

Testimony of Jack Hooper, Transcript of Proceedings, pp. 10763 - 10764

Exhibit P-19, pp. 68-69, 73

153. Indeed, if the caveats had been in place when the US authorities sought to use Canadian information to effect Mr. Arar’s removal from the US to Syria, US authorities would have had to seek the consent of the RCMP and CSIS to do so. Deputy Commissioner Loeppky testified that before any such approval would be given by the RCMP inquiries would have been made about the nature of the US proceeding, how the information could be protected and also the possible results of the proceedings in question. If these questions had been asked and answered then the RCMP would have known that Mr. Arar’s removal to Syria was at play in the US proceedings. They would have then been

able to take steps to stop it.

Testimony of Gary Leoppky, Transcript of Proceedings, July 28, 2005, pp. 8704, 8714

154. It is also important for the Commissioner to note that, although the former Deputy Commissioner Loepky acknowledged that there were policy breaches, to his knowledge no disciplinary action was ever taken against any AOCANADA investigators.

Testimony of Former Deputy Commissioner Gary Loepky, Transcript of Proceedings, p. 8725

155. When one considers that the evidence clearly reveals that it was as a result of RCMP information sharing that Mr. Arar came to the attention of the U.S. authorities and was, ultimately placed on their watch list, the importance of the decision to share information with the U.S. is put into a clear context. Independently of whether or not the caveats were down, there is an important issue which must be addressed, which is whether or not, in light of the 'different tactics' used by the U.S. in its war on terrorism, information concerning national security investigations of Canadian citizens or residents should be shared with the U.S. If the sharing of information might result in the illegal rendition of a Canadian citizen to a third country where he or she might be subject to torture, then we submit it is not appropriate to share this type of information. In the alternative, we must ensure that any such information sharing is undertaken with clear and unconditional safeguards which ensure that the person will not be subject to rendition or other unlawful acts.

Exhibit P-124
Exhibit P-125
Exhibit P-83, Part II, p. 197

b) National Security Policy

156. In addition to the caveats issue, in our submission further breaches in policy likely occurred as a result of the classification of the investigation. Inspector Cabana classified the investigation as a purely criminal investigation and stated that the national security policy was not applicable to the investigation.

*Testimony of Inspector Mike Cabana, Transcript of Proceedings, pp. 7918 - 7920
Exhibit P-12, tab 34*

157. Former Deputy Commissioner Loeppky, on the other hand, testified that it was indeed a national security investigation and that the national security policy did apply.

Former Deputy Commissioner Loeppky, p. 8398

158. It is apparent from the evidence that AOCANADA investigators operated as if the national security policy did not apply and that Project AOCANADA's compliance with some aspects of the policy was coincidental and occurred because of the instructions of the CROPS officer. Inspector Cabana testified that he meant in the sense of the reporting structure that the policy did not apply. This statement raises serious concerns as it speaks to the lack of centralized control of the investigation.

Testimony of Inspector Cabana, Transcript of Proceedings, p. 8296

159. This issue is of critical importance. It is clear that the policy of the RCMP at the time was that national security investigations should be subject to centralized oversight and control. This dispute as to the classification of the investigation resulted in the investigation

not being subject to the centralized control which was the intent of the National Headquarters. The evidence reveals that many decisions made unilaterally by the AOCANADA team might not have occurred had there been the degree of centralized oversight intended by National Headquarters. Former Deputy Commissioner Loeppky agreed under cross-examination that if Mr. Proulx had the centralized co-ordination he desired he would have been aware of the information sharing undertaken by AOCANADA investigators with the U.S. In this context, one need only consider what has been known as the 'data dump', which is discussed below. Given that the RCMP does not have, at least based on the public record, any precise knowledge as to what was contained in the information shared with the U.S., it is impossible to assess the potential consequences of the data dump on Mr. Arar and others.

Testimony of Former Deputy Commissioner Loeppky, Transcript of Proceedings, pp. 8738 - 8738

c) Foreign Information Sharing going through headquarters

160. Another concern we would like the Commissioner to address was that foreign information sharing was not occurring through headquarters. Even before Sergeant Flewelling was assigned at headquarters to the AOCANADA investigation, in a meeting on April 12, 2002 he made reference to a lack of communication between AOCANADA and headquarters. A concern about not all correspondence going to CID via the field was expressed on September 25, 2002. It is apparent from the evidence that this remained a continuing problem. Given the general NSC claims over the degree and extent of the information sharing, we find it difficult to assess the potential consequences of these breaches of RCMP policy. However, given that the policy is in place to ensure that

information sharing is carefully reviewed prior to it happening, we have serious concerns about the implications of the sharing of information without any oversight by National Headquarters.

Exhibit P-211, pp. 5, 33, 63-64, 69

d) Data Dump

161. In our submission, the data dump that occurred on April 2, 2002 was the biggest breach of RCMP policy and protocol on the public record. AOCANADA investigator mirrored the entire SUPERText database, which included all correspondence, documentary evidence, the fruits of the search, officers' notes, documents and correspondence from other domestic agencies and the SITREPs, and shared this information with the FBI and likely the CIA. The information obtained from the background investigation of Mr. Arar and any reference to him in the SITREPs report were among the documents shared.

Testimony of Inspector Mike Cabana, Transcript of Proceedings, pp. 7908 - 7910
Exhibit P-85, Vol. 1, tabs 24 & 25

162. The information was not vetted for relevancy as a large part of the information had never been viewed by investigators. No caveats were attached to the documents regarding the purpose that the documents could be used for. Given that computer hard drives from the search were mirrored, it is almost certain that irrelevant and private information was handed over to the US Authorities.

Exhibit P-19, p. 68
Testimony of former Deputy Commissioner Gary Loepky, Transcript of Proceedings, pp. 8704 - 8706

163. While none of the witnesses from headquarters had been privy to the arrangements at the time it was shared, they all agreed that it was contrary to RCMP policy.

Testimony of Sergeant Rick Flewelling, Transcript of Proceedings, pp. 9743, 9948
Testimony of Sergeant Ron Lauzon, Transcript of Proceedings, p. 10133
Testimony of former Deputy Commissioner Loepky, Transcript of Proceedings, pp. 8437 - 8440, 8704 - 8706

164. It is also very likely, and it is alluded to in the documents, that the RCMP failed to respect caveats/conditions from their domestic partners.

Exhibit P-19, p. 68

165. Given the general NSC claims over the degree and extent of the information sharing, we find it difficult to assess all the potential consequences of the breach of RCMP policy. However, given that the information sharing policy is in place to ensure that information sharing is carefully reviewed prior to sharing, we have grave concerns about the decision to share holus bolus all of this information with U.S. agencies, especially given the lack of any oversight or concurrence by National Headquarters. We wish to emphasize that in our view such whole scale information sharing without any evaluation of relevancy or privacy concerns should never be condoned or accepted.

166. Counsel for Mr. Arar submit that it is abundantly clear that the conduct of the AOCANADA investigation was fraught with difficulties from its inception. Indeed, as we have suggested above, we have serious concerns about whether the CSIS files ought to have been transferred from what was an intelligence investigation carried out by

experienced intelligence officers, to a criminal investigation carried out by persons with little or no expertise in the subject matter that they were investigating. However, our concerns are exacerbated by the evidence of the lack of a clear understanding between the AOCANADA team and the CID as to the nature of the investigation, and the rules to be applied. These problems led to serious breaches of RCMP policy which in our submission put the safety of Canadian citizens at risk. Moreover, it is clear that the CID did not have the proper resources to undertake its supervisory role.

167. There has been evidence which indicates that some of the decisions were taken in the heat of the events post 9/11. However, in our respectful submission that can neither be considered an adequate explanation or an excuse for the serious problems that are now apparent on the public record before the Inquiry. In our submission, it is likely that in the future there will be other moments where extraordinary events may push the RCMP to consider a particular course of action. As such, counsel for Mr. Arar cannot understate the importance of the Commissioner making recommendations that may assist in avoiding the missteps that took place in this case.

RECOMMENDATIONS

168. Given all of the above, counsel for Mr. Arar request that the Commissioner recommend that all National Security Investigations must be clearly identified as such from the inception.

169. We also request that the Commissioner recommend that the rules of the conduct of

such investigations should be clearly spelled out in writing so as to avoid the possibility of misunderstandings.

170. We further request that the Commissioner recommend that all National Security Investigations be subject to centralized control with clear lines of reporting through headquarters.

171. Finally, we request that the Commissioner recommend that an independent arms length oversight body be created to monitor and review the progression of national security investigations to ensure that policies are being adhered to.

(xii) Did the RCMP jeopardize the safety of Mr. Arar by sharing information concerning him with the United States when he was not the target of the investigation and was only a person of interest to the RCMP as a potential witness and they did not have reasonable and probable grounds to arrest him or to even obtain a search warrant?

172. Mr. Arar was not the target of the AOCANADA investigation. He has been given different labels but Inspector Cabana testified that Mr. Arar was simply a person of interest as a potential witness.

Testimony of Mike Cabana, Transcript of Proceedings, June 29, 2005, p. 7915

173. Whatever evidence the RCMP had about Mr. Arar it did not give them reasonable and probable grounds to arrest Mr. Arar or obtain a search warrant for his residence.

Exhibit P-140, tab 11, pp. 2-3

Testimony of Mike Cabana, Transcript of Proceedings, June 30, 2005, pp. 8281 - 8282

174. The sharing of information with US authorities pertaining to Mr. Arar, when he was not a target of a Canadian investigation, was inappropriate. The fact that information was shared with a foreign source about a peripheral person of interest to a national security investigation, coupled with the method in which it was shared (without proper caveats and sometimes without central co-ordination) causes us great concern and in our submission jeopardized the safety of Mr. Arar. As outlined above, any decision to share information about Canadian citizens or residents with any foreign intelligence agency including the FBI or CIA should only be made after careful evaluation of a series of factors including, the importance of the information to the foreign agency, the relevance of the information to any investigation, and most importantly the human rights record of that agency.

RECOMMENDATIONS

175. Counsel for Mr. Arar request that the Commissioner recommend that strict criteria and guidelines be put in place limiting the sharing of information with foreign agencies about persons who are not targets of an investigation.

176. Counsel for Mr. Arar also request that the Commissioner recommend that the RCMP be required to seek assurances from the U.S. agencies that the information provided to them will not be used in any way to render a Canadian to a foreign country.

(xiii) Did the RCMP fail to take appropriate steps when sharing information

about Mr. Arar with the United States to ensure that the United States would not use that information in a manner that could have negative consequences to a Canadian citizen?

177. The RCMP failed to take appropriate steps to ensure that the information that was shared about Mr. Arar would not lead to adverse consequences. First, as discussed above, they inappropriately shared information about a person who was not a target of a national security investigation. Second, the RCMP failed to obtain CID approval each time information was shared and failed to place appropriate caveats on the information shared with the US according to RCMP policy. The April 2, 2002 “data dump” where databases were mirrored and shared without caveats before the documents had been vetted for relevancy and personal information, is a good example of the failure of the RCMP to take appropriate steps to protect Canadians whose information may have been shared with the United States.

RECOMMENDATIONS

178. We rely on the above recommendations relating to information sharing.

(xiv) Were the RCMP aware of the United States’ policy of rendition at this time and, if so, was information sharing with the United States evaluated in light of this policy?

182. Former Deputy Commissioner Loeppky testified that the RCMP were not aware of the U.S. policy of extraordinary rendition during this time.

Testimony of Gary Loeppky, Transcript of Proceedings, July 27, 2005, p. 8463

183. What is quite alarming is that Mr. Loepky testified that knowing about the policy of rendition has not in any way changed the way in which the RCMP collaborate with their foreign partners.

Testimony of Gary Loepky, Transcript of Proceedings, July 27, 2005, pp. 8463 - 8464

184. Therefore, even if the Commissioner determines that the RCMP were aware or should have been aware of this policy at this time, the evidence is clear that the RCMP would not have conducted their affairs with the Americans any differently.

RECOMMENDATIONS

185. We would also rely upon our above recommendation with regard to seeking assurances from U.S. partners in national security investigations.

D. THE ACTIONS OF AMBASSADOR PILLARELLA

186. We have not been privy to all of the information that may shed light on whether Ambassador Pillarella facilitated the flow of information between the RCMP and Syria. We are therefore not in a position to make fulsome submissions on this issue. There is, however, some evidence before the Inquiry that during this period of time Ambassador Pillarella was involved in facilitating or attempting to facilitate the flow of intelligence information, question, and/or meetings between the RCMP and Syrian officials regarding Canadians detained in Syria.

187. In Inspector Cabana's notes of a September 10, 2001 meeting between AOCANADA and Ambassador Pillarella concerning Mr. Almalki it is noted as follows:

We provided a briefing to the Ambassador regarding the origin of the investigation and the reason for our interest in [redacted]. Mr. Pillarella agreed facilitate any future request to Syrian authorities. Mr. Pillarella suggested that the Syrian authorities would likely be expecting us to share with them. We explained our intentions to share any of our project information relevant to whatever investigation Syria is conducting with them. We explained that packages have already been prepared to this end.

Exhibit P-166, behind p. 44

188. In a November 3, 2002 email Ambassador Pillarella describes a meeting with General Khalil:

General Khalil seemed now disposed to accept that he could meet with a Canadian official. You should know that [redacted] therefore this is something which should be discussed in Ottawa on the best way to proceed. It is the RCMP that has asked to have direct access to [redacted].

It is clear from this email that the RCMP had made a past request to have direct access to a Canadian detainee (presumably Mr. Almalki) and that Ambassador Pillarella had asked General Khalil whether he would permit access by the RCMP on a prior occasion.

Exhibit P-138

189. It is extremely important for the Commissioner to consider whether, by facilitating the flow of information to Syrian Military Intelligence, with respect to Canadian citizens who were under investigation, the Canadian Ambassador encouraged or instigated the use of torture against Canadians. We will be making more fulsome submissions about the role of

the Ambassador later in these submissions.

E. THE ROLE OF OTHER DFAIT OFFICIALS

(i) Did DFAIT breach Mr. El Maati's privacy rights when it provided to the RCMP and CSIS copies of the August 2002 Consular visit?

190. Ms Pasty-Lupul testified that she attended a meeting in August 2002 at RCMP headquarters. She noted that the RCMP had a copy of the August 12, 2002 consular note. She had no knowledge of how the consular note came into the possession of the RCMP but testified that Mr. Pardy, members of ISI, and other persons within DFAIT would have had access to copies of this consular note. She testified that she recalls discussing at this meeting how she carried out her role as consular officer in this case.

Testimony of Myra Pasty-Lupul, Transcript of Proceedings, July 29, 2005, pp. 8951 - 8953

191. The personal notes of Corporal Flewelling disclose that this meeting took place on August 15, 2002. Members of CSIS, PCO, RCMP and DFAIT were present at that meeting to discuss Mr. El Maati. It is therefore reasonable to assume that CSIS officials were also in possession of the consular note or, at least, had the opportunity to view the report.

Exhibit P-211, p. 28

192. This issue points to a pattern of conduct and a systemic pattern of sharing of confidential consular information to Canadian police and intelligence agencies. On August 12, 2002, Mr. El Maati told consular officials in Egypt that he had been severely tortured when he was held incommunicado and interrogated in Syria. A consular note was

generated as a result of this visit

Exhibit P-192

193. As will be discussed more in detail below, detained Canadians abroad are given the expectation that the information they provide during consular visits will be kept confidential and will only be used to assist them. They are never informed that this information may be shared with the RCMP and/or CSIS. As such, when DFAIT shares this information without the detainee's informed consent, it breaches the privacy rights of the detainee. We will make more fulsome submissions on this issue and make recommendations related to this later in our submissions.

F. THE ROLE OF THE CANADA BORDERS SERVICES AGENCY (CBSA)

194. No witnesses from the CBSA were called to testify at the public hearings and the government has claimed NSC over most of the information that would shed light on the role of CBSA officials with respect to Mr. Arar. The only facts that we have been apprised of are that CBSA officials conducted a secondary search of Mr. Arar on November 29, 2001 and December 20, 2001 and, as a result of the search on December 20, 2001, CBSA officials seized Mr. Arar's palm pilot and computer.

Exhibits P-174 to P-177
Exhibits P-83 tab 1 p. 1; tab 2 p. 71
Exhibit P-19 p. 6 - 8
Exhibit P-85 Vol. 3, tabs 92 - 96

195. In our submission, the Commissioner should take into account Mr. Edelson's testimony as outlined above, that somebody logged on to Mr. Arar's computer after the

seizure and there was a significant decline in the power on his laptop (by 16%). Mr. Edelson further testified that in a meeting with AOCANADA investigators, he was told that Mr. Arar was of interest to the RCMP in part because the names of other people of interest were on Mr. Arar's palm pilot.

Testimony of Michael Edelson, Transcript of Proceedings, June 16, 2005, pp. 7250, 7352, 7357, 7366, 7400 - 7402
Exhibit P-143

196. Based on Mr. Edelson's testimony, the Commissioner should find that the RCMP viewed or were given a copy of the information contained on Mr. Arar's palm pilot and laptop computer. As a result, the conduct of CBSA officials during this period of time raises a myriad of questions that we request that the Commissioner consider:

- A. Was Mr. Arar placed on a CBSA and/or terrorist watch list?

See Exhibit P-174, p. 2- print-out of Mr. Arar's travels between September 12, 2000 and January 24, 2002 and reference to "terrorism"
- B. Was the CBSA instructed to place Mr. Arar on a watch list by the RCMP or CSIS?
- C. Under what authority was Mr. Arar's name placed on the watch list?
- D. What is the threshold to place someone on a Canadian watch list?
- E. Why was Mr. Arar subjected to a secondary search on November 29, 2001 and December 22, 2001?

See Exhibit P-175, p. 2 "value and possible viewing by NSIS"
- F. Were CBSA officials instructed to stop and search Mr. Arar either on November 29, 2001 or December 22, 2001 by the RCMP and/or CSIS?
- G. Were CBSA officials instructed to seize Mr. Arar's palm pilot and computer by

the RCMP and/or CSIS?

- H. Were these seizures lawful?
- I. Did the CBSA, RCMP and/or CSIS view the computer and palm pilot seized from Mr. Arar?

See Testimony of Michael Edelson, Transcript of Proceedings, June 16, 2005, pp. 7250, 7400, 7352, 7357, 7366, 7402

- J. Was information collected during the CBSA search of the computer and palm pilot passed on to the RCMP and/or CSIS?

See Testimony of Michael Edelson, Transcript of Proceedings, pp. 7352, 7357, 7366, 7402

- K. Was information collected during the CBSA search of the computer and palm pilot passed on to the Americans?

197. The issue of the relationship between the CBSA and the RCMP and CSIS is one of vital importance. We request that the Commissioner explore whether decisions with respect to watch lists and search and seizures are made by CBSA officials alone, in consultation with the RCMP or CSIS or at the instruction of these institutions. We have already dealt with the issue of the watch list and the lawfulness of the search and seizures earlier in these submissions. CBSA is an autonomous government institution and therefore it is imperative that it has its own safeguards, standards and oversight mechanisms.

RECOMMENDATIONS

198. We would request that the Commissioner recommend clear criteria to be established for the threshold for placing an individual on a CBSA watch list.

199. We would further request that the Commissioner recommend that an independent oversight body be set up which would allow for external review of decisions to place a Canadian on a CBSA watch list.

III. PERIOD 2: DETENTION IN THE UNITED STATES AND DEPORTATION TO SYRIA - SEPTEMBER 26, 2002 TO OCTOBER 8, 2002

A. INTRODUCTION

200. This period it is the submission of counsel for Mr. Arar that the relevant officials of the Canadian government whose actions should come under scrutiny by the Commissioner are:

- a) CSIS whose officials were aware of the detention of Mr. Arar in the United States and might have had some communication with U.S. officials during this time period;
- b) The RCMP, including the AOCANADA Investigative Team and members of CID who were in communication with the U.S. agencies during this time period; and
- c) DFAIT whose officials met with Mr. Arar and were in communication with U.S. authorities and Mr. Arar's family and the RCMP during this time period.

B. THE ROLE OF CSIS

201. The actions of CSIS officials are very difficult for counsel for Mr. Arar to assess because we have only been given very limited access to the evidence relating to CSIS

during this period of time. However, the following evidence is on the public record before the Inquiry.

204. CSIS learned of Mr. Arar's detention from DFAIT on October 2, 2002. On October 2, CSIS headquarters in Ottawa requested its Washington office to contact U.S. authorities to seek clarification about the reasons for Mr. Arar's detention but no response was received.

On October 3, 2002, CSIS received and read a report dated September 26, 2002 from the RCMP that Mr. Arar would be denied entry into the U.S. Between October 2 and 8, 2002, CSIS officials made a number of "call chasers" trying to elicit information about Mr. Arar's detention.

CSIS summary, p. 4 - 5

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10595

205. DFAIT advised CSIS that the arrest did not appear to relate to an immigration matter and that it could be much bigger.

206. CSIS was aware that the RCMP was attempting to interview Mr. Arar in the United States.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10597 - 10598

207. Between September 26 and October 8, 2002, CSIS did not give any American agency any information about Mr. Arar during this time period.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10598

- (i) **Was there a breakdown in communication between CSIS and the RCMP concerning Mr. Arar's detention in the U.S. and was CSIS responsible for this breakdown in communication?**

211. Counsel for Mr. Arar is deeply concerned about the evidence which suggests that there was a significant delay between when the RCMP learned of Mr. Arar's impending detention on September 26, 2002 and when it came to the attention of CSIS on October 2, 2003. It is not clear why there was an eight day delay and whether the delay occurred at the RCMP end, the CSIS end or a combination of the two. In our view such delay is inexplicable and of grave concern.

CSIS Summary, p. 4

212. CSIS officials were generally aware of the policy of rendition but RCMP officials were not. CSIS would be the normal interlocutor with the CIA and presumably would have been in a better position to obtain information and influence them. Yet eight days passed before Mr. Arar's detention was brought to the attention of CSIS. This points to a serious breakdown in communications. The Commissioner should make a finding of fact to this effect. To avoid repetition, we will not be canvassing this issue again in our submissions for the RCMP. Counsel for Mr. Arar would ask that the Commissioner carefully examine the *in camera* evidence to determine where the breakdown in communication occurred.

Testimony of former Director of CSIS Ward Elcock, Transcript of Proceedings, June 21, 2004, pp. 163 - 164

Testimony of Deputy Commissioner Garry Loepky, Transcript of Proceedings, June 30, 2004, pp. 824 - 825; July 27, 2005, p. 8462

RECOMMENDATIONS

213. In light of the evidence which appears to suggest that there was a breakdown in communications between CSIS and the RCMP during this critical time period, counsel for Mr. Arar request that the Commissioner recommend an interagency communication protocol be established to ensure that in all cases where a Canadian citizen, accused or suspected of being involved in terrorist activities, is detained abroad, the relevant agencies -- CSIS, DFAIT and the RCMP -- share all available information so that informed decisions can be made to assist and protect the Canadian citizen.

(ii) Did CSIS take the appropriate steps to inquire with U.S. authorities when it learned that Mr. Arar was detained in the U.S. under 'serious circumstances'?

214. Of even more concern is the failure of CSIS officials to take urgent action once they were so notified of Mr. Arar's detention on October 2, 2002. A CSIS official was advised by DFAIT "that the arrest did not appear to relate to an immigration matter, and that DFAIT had advised that 'it could be much bigger'". Independent of the communication with DFAIT, CSIS was aware that Mr. Arar was part of a national security investigation in relation to Al-Qaeda. CSIS was also aware of the rendition policy. Although CSIS sought further information regarding the circumstances of Mr. Arar's detention from their contacts in the United States via their Washington office, this task was not labelled priority by CSIS and in fact no response was ever received by CSIS.

CSIS Summary, p. 5
Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10597

215. Counsel for Mr. Arar believes that CSIS ought to have intervened more aggressively once it learned of Mr. Arar's detention and would ask the Commissioner to make a finding to this effect.

(iii) Did CSIS improperly directly or indirectly share information with the American authorities during this time? If so, did they put the appropriate caveats and conditions on the information to ensure it was not sent to Syria (or any other third party)?

216. Mr. Hooper's testified that CSIS did not give any American agency any information about Mr. Arar during this time period. However, Mr. Hooper also testified that there were a number of phone calls made during this period to try to elicit information about the circumstances surrounding Mr. Arar's detention. As such, we cannot preclude the possibility that information about Mr. Arar was verbally communicated during one of these phone calls.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10598

217. Although the public record does not disclose any evidence on this point, we would request that the Commissioner carefully review the *in camera* record to determine whether there was any information about Mr. Arar shared by CSIS with American agencies during this time period and, if so, whether this sharing was in accordance with CSIS guidelines for information sharing.

218. The Commissioner must also consider whether CSIS information was indirectly passed on via another Canadian agency (i.e. the RCMP) to the United States and, if so,

whether it was passed on with the knowledge and consent of CSIS officials.

219. In this regard, Mr Hooper indicated in his testimony that it was very important to the credibility of the Service that caveats be respected and that CSIS would have treated a breach of any of its caveats with the RCMP very seriously. Chief Superintendent Brian Garvie's report, while not specifically naming CSIS, discloses that the RCMP on a few occasions shared information with another agency in breach of caveats imposed by the agency who originally gave the RCMP that information. In an e-mail sent out by Sergeant Flewelling to AOCANADA investigator Pat Callaghan on October 6, 2002, Sergeant Flewelling alludes to the possibility CSIS information was shared or referred to by the RCMP without first obtaining CSIS' authorization in responding to the American request for further information on October 4, 2002. Counsel for Mr. Arar was prevented due to NSC claims made by the Government of Canada from exploring this area further to determine whether a breach of CSIS caveats did occur and we would, therefore request that the Commissioner reach a finding concerning whether information provided by CSIS to the RCMP was subsequently shared with the U.S. without first obtaining authorization from CSIS representatives.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10763 - 10764

Testimony of Richard Flewelling, Transcript of Proceedings, August 23, 2005, pp. 9860 - 9861

Exhibit P-227

Exhibit P-19, p. 68 - 69, 73

220. If the Commissioner concludes that there was a breach of caveats by the RCMP in relation to CSIS information, then we would ask the Commissioner to consider the effect

that these breaches had on Mr. Arar's situation. The purpose of placing caveats or conditions on information is to allow the originator of the information to consider, prior to its transfer to a third party, the appropriateness of the transfer. If the RCMP breached CSIS caveats, the RCMP effectively deprived CSIS of any input into the decision to share CSIS information with U.S. agencies. Presumably, in situations where CSIS is approached by the RCMP to disclose CSIS information with a foreign agency, discussions will ensue and CSIS will evaluate the propriety of sharing the information, taking into account CSIS' own interests, the relevancy of the information, the purpose for which the foreign agency intends to use the information, and any *Privacy Act* considerations. The process of the RCMP seeking authorization from CSIS to release or refer to CSIS information to a foreign agency is by no means a mere formality and would involve careful consideration by CSIS as to whether to allow the information to be shared. Counsel for Mr. Arar submit that, if these breaches of CSIS caveats occurred, the breaches are a very serious matter and the Commissioner should consider whether appropriate sanctions were imposed.

RECOMMENDATIONS

221. Counsel for Mr. Arar is deeply concerned about the manner in which information was shared in this case and to the overall lack of scrutiny over decisions involving sharing of highly significant personal information with foreign agencies. We urge that the Commissioner consider recommending an oversight mechanism that would be able to scrutinize the activities of both CSIS and the RCMP, including information sharing when they are involved in joint investigations.

(iv) Did CSIS improperly share information with the Syrian authorities during this time?

222. We have no information on the public record with respect to information sharing with the Syrians relating to Mr. Arar or other targets or persons of interest in the AOCANADA investigation during Mr. Arar's detention in the United States. There is evidence, however, that CSIS had a prior relationship with the Syrian Military Intelligence. Ambassador Pillarella testified that he did not facilitate the meeting between CSIS agents and representatives of Syrian Military Intelligence in November 2002. Indeed, according to Ambassador Pillarella's testimony at the Inquiry, CSIS never disclosed to Ambassador Pillarella the identities of the CSIS contacts in Syrian Military Intelligence.

Testimony of Ambassador Pillarella, Transcript of Proceedings, June 14, 2005, pp. 6875 - 6876, 6884 - 6889
Exhibit P-134, Tab 10

223. We are therefore concerned that information about Mr. Arar might have been passed to the Syrians by CSIS. This concern flows in part from Mr. Arar's public statements that, when he was questioned in Syria, the Syrians were aware of the information that had been in the possession of the U.S. authorities, some, if not all, of which had originated from the RCMP and which may have included CSIS information. We acknowledge that it is possible that information used by the Syrians to interrogate Mr. Arar came from the U.S. If this were the case, it raises serious concerns that the United States breached Canadian caveats when they share this information with the Syrians without getting prior authorization. If CSIS information was sent to Syria, this raises serious questions about Canadian relationship with regimes that engage in torture.

224. If the evidence discloses that CSIS provided information to the Syrians during this time period we would ask the Commissioner to consider whether such sharing was justified. We have already indicated in our submissions above that we do not believe that CSIS should provide information to regimes with a reputation for engaging in torture under any circumstances.

Exhibit P-42, Vol. 8, tab 693

RECOMMENDATIONS

225. We would refer the Commissioner to our previous submissions with respect to recommendations regarding CSIS sharing information with the Syrians.

(v) Did CSIS in any way give a green light, encourage, and/or fail to prevent the deportation of Mr. Arar to Syria?

226. Due to the Government's NSC claims we are unable to make any meaningful submissions on this fundamental issue. The only information on the public record that may shed some light on this issue is that DFAIT advised CSIS officials on October 2, 2002 of the serious nature of Mr. Arar's detention in the United States and CSIS made a series of formal and informal inquiries with the Americans. We do not know the nature or content of CSIS' communication with the American authorities during this period of time.

CSIS Summary, p. 5

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10598

227. We therefore request that the Commissioner carefully review the *in camera*

evidence to determine whether there is any such evidence that might suggest that any CSIS officials were aware of, acquiesced, or turned a blind eye in to the possibility that Mr. Arar would be sent to Syria.

C. THE ROLE OF THE RCMP

(i) Should the RCMP have communicated to DFAIT their knowledge that a Canadian citizen was going to be or had been arrested in the United States?

228. DFAIT officials were not notified by the RCMP either prior or subsequent to Mr. Arar's arrest that a Canadian was detained in the US. Mr. Pardy testified that he would not expect the RCMP or CSIS to contact DFAIT if they were aware of this type of information, although there have been instances where they have done so. Ms Collins speculated that if she had known that the RCMP was involved, it may have affected her handling of the case in terms of evaluating the seriousness of the case.

Testimony of Gar Pardy, Transcript of Proceedings, May 24, 2005, pp. 3300 - 3304
Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3165 - 3166

229. Former Deputy Commissioner Loeppky testified that it is not the RCMP's normal practice to advise DFAIT officials of an arrest of a Canadian in the United States and it would only be in cases where they believed consular services were not being provided where they would notify DFAIT officials. He expressed concern about advising DFAIT officials of an arrest because it could be counterproductive to an investigation or the

detainee may not want consular services. Nonetheless, he confirmed that the RCMP only share information with DFAIT where it is important, consistent with the *Privacy Act* and it is needed for DFAIT officials to carry out their duties.

Testimony of Gary Loepky, Transcript of Proceedings, July 27, 2005, pp. 8461, 8469 - 8470; 8503

230. While these concerns may be valid in some circumstances, the case here was clearly a highly unusual one. The RCMP was advised by U.S. authorities of its intention to detain a Canadian citizen who had been the subject of a joint U.S. Canada national security investigation involving an alleged Al-Qaeda cell in Canada. Therefore, the moment that the RCMP learns a Canadian would be detained that might need consular services, the RCMP had an obligation to inform DFAIT officials of that information.

231. The RCMP has a liaison officer at DFAIT whose role it is to ensure that relevant information is shared between the two agencies. Given the unusual nature of this case, the RCMP should have immediately advised DFAIT of its involvement in the investigation of Mr. Arar.

232. In reaching findings about this issue, the Commissioner must consider whether the RCMP gained any advantage by not notifying DFAIT of Mr. Arar's arrest. Former Deputy Commissioner Loepky admitted that the RCMP had the expectation that the U.S. authorities would share the fruits of their interrogation of Mr. Arar. The RCMP were previously aware of Mr. Arar's desire not to be interviewed by the police without a lawyer in

Canada. By not notifying consular services at DFAIT whose services are aimed at ensuring a detainee has access to a lawyer, Mr. Arar was interrogated for several days without a lawyer present.

Testimony of Gary Loeppky, Transcript of Proceedings, July 27, 2005, p. 8471

233. Given all of the above we ask the Commissioner to find as a fact that the RCMP acted improperly in failing to immediately notify DFAIT of its involvement in the Arar matter, especially in light of the evidence that DFAIT would have responded with more urgency had it been aware of the RCMP's role in the investigation.

RECOMMENDATIONS

234. Counsel for Mr. Arar request that the Commissioner recommend that the RCMP give immediate notification to DFAIT officials of Canadians who they are aware will be detained or have been detained in a foreign jurisdiction so that DFAIT officials can assess whether the detainee may require consular assistance

(ii) Was it appropriate for the RCMP to provide questions to the U.S. authorities to be used in interrogating Mr. Arar?

235. On September 26, 2002, the US authorities asked AOCANADA investigators for questions to be asked during the interrogation of Mr. Arar. The investigators faxed over the list of questions that they had compiled in preparation for the very interview the RCMP had wanted to have with Mr. Arar in January 2002. As noted above, this interview never took place because the RCMP refused to accept the conditions that Mr. Arar's lawyer had

attached to the interview, including a condition that a lawyer be present throughout the interview.

Exhibit P-83, Part I, p. 187

Exhibit P-84, p. 26

Exhibit P-222

Testimony of Mike Cabana, Transcript of Proceedings, June 29, 2005, pp. 7896 - 7897

Testimony of Michael Edelson, Transcript of Proceedings, June 16, 2005, p. 7415; 7920

236. On the fax cover sheet sent with the questions, AOCANADA investigators thank the American officials for their "assistance" in interviewing Mr. Arar. Both Inspector Cabana and former Deputy Commissioner Loeppky testified that by co-operating with the American authorities in providing the questions for the American interrogation of Mr. Arar, the investigators were expecting that the fruits of the interrogation by the Americans would be shared with them.

Exhibit P-83, Part I, p. 187

Testimony of Mike Cabana, Transcript of Proceedings, June 29, 2005, pp. 7929 - 7930

Testimony of Gary Loeppky, Transcript of Proceedings, July 27, 2005, p. 8471

237. It was highly improper and contrary to the *Charter* for the RCMP to provide the Americans with questions to ask Mr. Arar during interrogation. Mr. Arar had clearly indicated the conditions upon which he would be willing to proceed with an interview in Canada and the RCMP knew that those same conditions would not be honoured United States. The RCMP were aware that Mr. Arar would not be given access to a lawyer at the border and that he would be in a vulnerable position.

Testimony of Mike Cabana, Transcript of Proceedings, June 29, 2005, p. 7934

238. In February 2002, former Deputy Commissioner's Loeppky's advice to Mr. Proulx was that it would be an option to pose questions directly or indirectly to a person detained in a foreign jurisdiction. Likewise, Inspector Cabana intimated that he did not think that the *Charter* would apply in circumstances where the interview was not at the direct request by the RCMP.

Testimony of Gary Loeppky, Transcript of Proceedings, July 28, 2005, pp. 8748 - 8749

Testimony of Mike Cabana, Transcript of Proceedings, June 29, 2005, p. 7816

239. There is no substantive difference between the RCMP requesting the United States interview Mr. Arar or the RCMP assisting the American interrogation by giving the Americans the questions that they want posed to Mr. Arar. In both instances the result would be the same; the RCMP expected to receive back the fruits of the interrogation and to succeed in getting indirectly what they could not get directly by conducting their own interview with Mr. Arar. As such, we submit that the RCMP were subverting Mr. Arar's constitutional rights by sending questions to be asked of Mr. Arar to the United States.

RECOMMENDATIONS

240. Counsel for Mr. Arar request that the Commissioner recommend that an RCMP policy be put in place to ensure that the RCMP cannot circumvent the rights of a Canadian citizen through the guise of having a foreign agency obtain information from the Canadian that the RCMP are not able to obtain directly from the Canadian.

(iii) Was it appropriate for the RCMP to request to interview Mr. Arar in the U.S.?

241. In addition to indirectly participating in the interrogations by having the Americans pose questions that the RCMP wanted answers to, the RCMP were also quite anxious to interview Mr. Arar while he was detained in the United States. The RCMP made the request to interview Mr. Arar on October 4, 2002, but as of October 8, 2002 the United States still had not responded to that request. A host of explanations were given for why the RCMP ultimately did not conduct the interview while Mr. Arar was detained in the United States [the RCMP plane was not available, it would be cost prohibitive, the interview was not a priority, investigators believed he would be deported to Canada. The Commissioner will need to decide which of the explanations, if any, he finds credible. In our submission, the fact that the United States had not approved the request is likely the primary reason that the interview did not occur.

Exhibit P-172
Exhibit P-85, Vol. 5, tab 27
Exhibit P-19, p. 23

242. The request to interview Mr. Arar was highly improper and such an interview would be unconstitutional. As stated in the previous section, Mr. Arar's lawyer had set clear terms and conditions for Mr. Arar's participation in an interview with the RCMP. The RCMP knew that Mr. Arar had a lawyer in Canada but at no time contacted Mr. Edelson to see whether there had been a change in Mr. Arar's position with respect to an interview. The RCMP

were trying to subvert the constitutional guarantees afforded to Mr. Arar in Canada by requesting to interview him while he was in an extremely vulnerable position as a detained person subject to deportation proceedings in a U.S. prison.

RECOMMENDATIONS

243. We would refer the Commissioner to our suggested recommendation in the previous section.

(iv) Did the RCMP improperly share information with the Americans during this period of time without taking proper care to ensure that Mr. Arar would not be placed at risk as a result of the sharing of information?

247. There are only two known instances of formal information sharing between September 26 to October 8, 2002: (1) the interview questions for Mr. Arar were sent on September 26, 2002 and, (2) on October 4, 2002, the RCMP responded to a series of questions posed by the Americans.

Exhibit P-83, Part I, pp. 187-189
Exhibit P-226

248. Former Deputy Commissioner Loepky testified that, before the RCMP share information with a foreign agency to use for purposes beyond mere intelligence gathering, the RCMP would need to know how that information would be used, the nature of the process and the possible outcome of the process.

Testimony of Gary Loepky, Transcript of Proceedings, July 28, 2005, pp. 8715 -

8717

249. When the RCMP sent the interview questions down to the United States, the RCMP were aware that the questions were for the purposes of interrogating Mr. Arar and were told that the outcome of the process would be that Mr. Arar would be denied entry to the United States and sent back to Zurich, his point of departure. There is no evidence on the public record that the RCMP sought assurances about the nature of the process for which the information would be used, specifically the RCMP never insisted that Mr. Arar be afforded a right to counsel for the interrogation and that he be informed of his right to remain silent.

Exhibit P-222
Exhibit P-223

250. After interviewing Mr. Arar, the Americans did not send him back to Zurich. Rather, they continued to detain him and sought further information from the RCMP to support criminal charges against him. At this point, or shortly thereafter, RCMP officers would have been aware that information they had given to the American authorities was used to interrogate Mr. Arar and keep him in custody in the United States without any charges and without access to a lawyer or his family for several days.

251. The exact wording of the American request for further information is not on the public record. The fax sent from CID to Project AOCANADA regarding the American request stated that the purpose of the request was to seek "any evidence that can assist in support of criminal charges" in the U.S. against Mr. Arar. Therefore the Commissioner must consider whether the purpose of the request was specified by the Americans and

whether the wording left open the possibility that the information could be used at the INS proceeding. The Commissioner must also consider whether the RCMP made appropriate inquiries about exactly how the information would be used in the US.

- (v) **Did the RCMP's failure to use caveats result in Canadian information being used in an American proceeding without the Americans having to seek consent from Canadian law enforcement and intelligence agencies? Are the caveats being used by the RCMP appropriate to prevent the use of information in rendition proceedings?**

254. Former Deputy Commissioner Loepky admitted that one of the potential consequences of not putting caveats on documents is that the information or documents could be used in a proceeding without restriction.

Testimony of Gary Loepky, Transcript of Proceedings, July 27, 2005, p. 8443

255. Mr. Loepky further testified that there are implied caveats on all documents and communications and there is an understanding between Canadian and U.S. law enforcement agencies that the agency would need to obtain the permission of the foreign agency before using that information in a proceeding. However, Mr. Loepky did not know if the INS adopted the same understanding regarding implied caveats.

Testimony of Gary Loepky, Transcript of Proceedings, July 27, 2005, pp. 8414, 8742

256. Former Deputy Commissioner Loepky testified that once there is a breach of caveats, the remedy is limited to raising the issue with the foreign agency. He further testified that the information sharing policy with the United States has not changed since

the Arar affair, although there is now a greater sensitivity to the impact that information will have in a case. Former Deputy Commissioner Loepky testified, however, that the misuse of caveated information with respect to Mr. Arar was raised with the Americans.

Testimony of Former Deputy Commissioner Gary Loepky, Transcript of Proceedings, pp. 8713 - 8714, 8718 - 8721, 8919 - 8920

257. Large amounts of information and documents were shared with American agencies in this case without caveats or conditions. The Commissioner must decide whether that information was indeed used during in the classified addendum of the INS proceeding, as surmised by Chief Superintendent Garvie, without prior authorization from RCMP officers. Given the fact that Mr. Arar came to the attention of the U.S. as a result of Canadian information and given the fact that Mr. Arar was interrogated based on Canadian information, it is reasonable to conclude that Canadian information was relied upon at the INS proceeding. We would also refer the Commissioner to the portion of the Walsh ITO which deals with the sealing order which lists one of the reasons that the affidavit needs at be sealed is that some of the information and material was obtained from foreign sources, such as the FBI.

Exhibit P-19, p. 71
Exhibit P-179, p. 98

258. If the information sent by the RCMP was indeed used in the rendition proceeding, the Commissioner must consider whether express or implied caveats used by the RCMP are sufficient to prevent the use of information in rendition proceedings.

(vi) Was the RCMP Liaison Officer present during any of the interviews that took place in the United States?

259. This is one of the areas that we cannot address due to broad NSC claims by the Government of Canada. We have heard evidence that the liaison officers generally can move around the country where they are located and would not have to seek instructions from headquarters in order to visit places in their assigned country. The Commissioner must therefore consider and make findings of fact as to whether the RCMP liaison officer in Washington was present during any of Mr. Arar's interviews with the American officials.

Testimony of Inspector Mike Cabana, Transcript of Proceedings, pp. 8270 - 8271

(vii) Was the RCMP aware or should the RCMP have been aware from their communications with American officials that Mr. Arar may be sent to a country other than Canada? If so, did the RCMP have a duty to inform the DFAIT of this information? Did the RCMP have a duty to take steps to prevent Mr. Arar's removal to Syria?

260. Due to NSC claims, we have not been privy to all of the communications that may have taken place between Canadian and American authorities. However, based on the publicly available evidence, it is clear that American officials gave RCMP officers clear signals that Mr. Arar may be deported to Syria.

- a) American officials told RCMP officers initially that they would be refusing Mr. Arar's direct entry into Canada. This was the first indication that the Americans did not want Mr. Arar to return to Canada.

Testimony of Richard Flewelling, Transcript of Proceedings, August 23, 2005, p. 9839

Exhibit P-233
Exhibit P-224

- b) American officials were interested in linking Mr. Arar to Al-Qaeda. This speaks to the threat posed by Mr. Arar according to the Americans. The RCMP should have been well aware of the harsh and swift response of American officials to alleged Al-Qaeda members. The RCMP may have not had knowledge of extraordinary rendition but the officers were fully aware of Guantanamo Bay.

Testimony of Richard Flewelling, Transcript of Proceedings, August 23, 2005, pp. 9841 - 9844
Exhibit P-172

- c) In a phone conversation on October 5, 2002, an American Embassy official asked if Canada had enough information to charge Mr. Arar. Sergeant Flewelling responded that Canada did not have enough evidence to support charges against Mr. Arar in Canada. The U.S. official indicated that the U.S. "feared" it did not have enough evidence to support criminal charges. This further speaks to the Americans' view of the threat posed by Mr. Arar. The use of the word 'fear' ought to have been a clear indication that the U.S. was very concerned about allowing Mr. Arar to go free.

Exhibit P-172
Exhibit P-211, p. 39

- d) During the October 5, 2002 conversation, the American Embassy Official stated that Mr. Arar was a dual national but had requested to be deported to Canada. In this context, the official then asked Sergeant Flewelling whether the RCMP could refuse Mr. Arar's entry into Canada. Sergeant Flewelling testified that he believed that this was just an administrative question and not a signal that the U.S. was looking to send Mr. Arar to a country other than Canada. If this was merely an administrative/immigration type inquiry, it should have struck Sergeant Flewelling as odd that the U.S. Embassy would contact an RCMP officer rather than the CBSA or Immigration Canada. This inquiry ought to have raised alarm bells that the Americans, who indicated in this conversation that they were well aware Mr. Arar was a dual national, were considering sending Mr. Arar to a country other than Canada, namely Syria.

Testimony of Rick Flewelling, Transcript of Proceedings, August 23, 2005, pp. 9847 - 9848
Exhibit P-211, p. 39

- e) RCMP officers did not ask American officials where Mr. Arar would be sent after the deportation process in the U.S. was completed nor did American officials ever give any assurances to RCMP officers to this effect. Several communications between the Americans and Canadians occurred during this period, however, up until the time that RCMP officers learned that Mr. Arar had been deported from the United States, the officers were still speculating about where Mr. Arar would be sent. Not one officer asked the U.S. officials

to definitively confirm Mr. Arar would be sent to Canada nor did any officers seek assurances that Mr. Arar would not be sent to Syria.

Testimony of Ron Lauzon, Transcript of Proceedings, August 23, 2005, p. 10175
Testimony of Richard Flewelling, Transcript of Proceedings, August 23, 2005, pp. 9968 - 9969

261. Counsel for Mr. Arar submits that the only reasonable conclusion that can be drawn from this evidence is that the RCMP was aware or at least ought to have been aware of the probability that Mr. Arar would be deported to Syria. They were aware early on that the U.S. decided he could not return directly to Canada. They were aware that the U.S. had concerns that he was connected to Al-Qaeda. They were advised on October 5, 2002 that the U.S. authorities were afraid that he could not be charged in the U.S. They were aware that he was a dual national and that his other nationality was Syrian. All of the above should have made it clear to the RCMP officials involved that there was a substantial risk of his deportation to Syria. On this basis, the Commissioner ought to find that the RCMP knew or ought to have known of the risk of deportation to Syria.

262. Given DFAIT's mandate to protect the rights of Canadians abroad, in our submission the RCMP had a duty to notify DFAIT officials of Mr. Arar's potential deportation to Syria. Former Deputy Commissioner Loepky testified that, while the RCMP usually do not share operational details with DFAIT officials, officers will do so where it is necessary for DFAIT to carry out its mandate. In our view, this would certainly be one of those situations. The evidence discloses that if the DFAIT officials had been aware of the RCMP involvement and of the risk of deportation measures could have been employed to seek to prevent the

deportation including intervening at higher levels within the U.S. administration.

Testimony of Gary Loeppky, Transcript of Proceedings, July 27, 2005, p. 8503

263. Further, the RCMP ought to have interceded with its U.S. counterparts and indicated their opposition to any effort to remove Mr. Arar to Syria.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4922 - 4925

Testimony of Maureen Girvan, Transcript of Proceedings, May 11, 2005, pp. 1796 - 1803

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3048 - 3049

264. At a minimum, the RCMP had a duty to make inquiries with American officials about the potential outcome of Mr. Arar's immigration hearing. The RCMP were providing information to the Americans about Mr. Arar while he was detained in the United States yet no officer asked the Americans to confirm that Mr. Arar would be deported to Canada and would not be deported to Syria. The RCMP officers had a general understanding that Syria did not adhere to the same human rights practices as in Canada and, more specifically, both AOCANADA investigators and CID officers had been privy to the August 15, 2002 meeting with CSIS and DFAIT where Mr. El Maati's allegations of torture in Syria had been discussed. Therefore, the RCMP officers were fully aware of the potentially serious consequences of deportation to Syria and should have made it clear to their U.S. counterparts that deportation to Syria was simply not acceptable.

Exhibit P-211, p. 28
Exhibit P-192

(viii) Did the RCMP in any way encourage or fail to act to prevent the

deportation of Mr. Arar to Syria?

265. This is one of the central issues in the Commissioner's mandate. In order to address this issue, the Commissioner must make factual findings as outlined above, whether any of the RCMP officers were aware or should have been aware that Mr. Arar would be deported to Syria prior to his deportation.

266. There is evidence in the form of statements from two high-level American officials that could support a finding that the RCMP gave the Americans the "green light" to deport Mr. Arar to Syria.

267. On October 15, 2002, American Ambassador Paul Cellucci made public statements that the Government of Canada should talk to our "local people" to find out the reason why Mr. Arar was sent to Syria. Then on April 29, 2003, Ambassador Cellucci stated that the RCMP did not want Arar back. Ambassador Cellucci reiterated these statements in private to Minister Graham. Ambassador Cellucci maintained this consistent position until August 1, 2003, just two days after the media reported that the Solicitor General Wayne Easter said that there may be rogue elements in the RCMP.

Exhibit P-42, Vol. 1, tab 84

Exhibit P-44

Exhibit P-48, Vol. 1, Tab 21

Testimony of Minister Bill Graham, Transcript of Proceedings, May 30, 2005, pp. 4226 - 4227

268. In a November 14, 2002 meeting between Minister Graham and Secretary of State Colin Powell, Mr. Powell also stated that the RCMP supported the decision to deport Mr.

Arar to Syria.

Testimony of Minister Bill Graham, Transcript of Proceedings, May 30, 2005, pp. 4148 - 4149
Exhibit P-42, Vol. 2, tab 202
Exhibit P-178, p. 24

269. Powell adhered to this position until November 5, 2003, just one day after Mr. Arar gave his press conference regarding his ordeal and after Minister Graham informed him of the immense public pressure to hold a public inquiry into this matter.

Exhibit P-42, Vol. 7, Tab 650
Testimony of Minister Bill Graham, Transcript of Proceedings, May 30, 2005, pp. 4307 - 4312

270. The public record also discloses a lack of central co-ordination for Project AOCANADA. Sergeant Flewelling testified that he was not the only person in contact with the Americans during this period of time and that there was direct communication between AOCANADA investigators and the American authorities that he was not privy to. It is impossible to preclude that one or more of the investigators who were in direct contact with the Americans gave the "green light" for the Americans to send Mr. Arar to Syria.

Testimony of Sergeant Rick Flewelling, Transcript of Proceedings, August 23, 2005, pp. 9941 - 9943
Exhibit P-221, p. 7

271. There is also evidence on the public record for the Commissioner to reach a finding that the RCMP turned a blind eye, failed to act and were complicit in the deportation of Mr. Arar to Syria. The conversation between Sergeant Flewelling and an American Embassy official, detailed above, is a prime example of a Canadian official turning a blind eye or

failing to act to prevent Mr. Arar's deportation to Syria. The American official gave clear signals to Sergeant Flewelling that U.S. authorities were considering sending Mr. Arar to Syria.

272. In addition, Liaison Officer Roy learned through a consular note about Mr. Arar's fears of being sent to Syria and of the allegations that he was a member of Al-Qaeda. The timing as to when Inspector Roy read the consular notes and reported them to other RCMP officers is a finding of fact that the Commissioner must make. Inspector Roy testified that he thinks he read the consular note on October 7, 2002, and communicated it to his Project AOCANADA officers on October 8, 2002. It is, however, possible that Inspector Roy read the consular note on October 3, 2002 and communicated the contents to Sergeant Flewelling on October 4, 2002 during a phone conversation. Such a call would explain why Sergeant Flewelling to go to the Immigration Section of the RCMP to seek guidance in this case, even though Flewelling denied in examination that this was his motivation. If Inspector Roy and Sergeant Flewelling were aware of Mr. Arar's fears that he would be sent to Syria by October 4, 2002, their failure to take any action sooner is of grave concern.

Exhibit P-211, p. 38

Testimony of Inspector Richard Roy, Transcript of Proceedings, August 23, 2005, pp. 9655 -9657

Testimony of Sergeant Rick Flewelling, Transcript of Proceedings, August 23, 2005, pp. 9815, 9827

273. At meetings throughout the day on October 8, 2002, the investigators discussed where Mr. Arar would be sent to. At a meeting held with an American partner that day discussions ensued about where Mr. Arar would be sent, yet none of the officers asked the

American partner about what the plans were for Mr. Arar's deportation and none of the officers said to the American partner that the Americans had better not send Mr. Arar to Syria.

Testimony of Ron Lauzon, Transcript of Proceedings, August 23, 2005, pp. 10157, 10175

274. Throughout this entire period, not one officer demanded that the Americans confirm where Mr. Arar would be sent following the immigration hearing or, as a minimum, sought assurances that Mr. Arar would not be sent to Syria. This speaks either to a failure of the RCMP to take reasonable steps to assure themselves that Mr. Arar would not be sent to Syria or to the fact that the RCMP suspected that Mr. Arar would be sent to Syria and deliberately chose not to have those suspicions confirmed or denied by the Americans.

275. This all supports a finding of fact that officials within the RCMP acquiesced to their U.S. partners in their plan to deport Mr. Arar to Syria.

276. Having shared information about Mr. Arar in the context of an investigation where Mr. Arar was not even a target, the RCMP owed a duty to Mr. Arar to ensure that he was not deported to Syria. Although the Americans refused to participate in the public hearings, two letters from the Americans, confirming that Mr. Arar's name was placed on a terrorist lookout list based on Canadian information. Had the RCMP not shared information about Mr. Arar with the Americans, in all likelihood Mr. Arar would have never been on the U.S. radar screen.

Exhibit P-125

277. In addition to the information shared with American law enforcement and intelligence agencies prior to Mr. Arar's detention in the United States, the RCMP provided the Americans with questions to be used during his interrogation. We know that the Canadian information formed the basis of the interrogation of Mr. Arar as he was asked questions about his lease and Mr. Almalki's name as it appeared on the lease.

Testimony of Gary Loeppky, Transcript of Proceedings, July 28, 2005, pp. 8724 - 8725

278. We are also aware that both the CIA and FBI requested RCMP assistance for further information to support criminal charges. In terms of the INS decision to deport Mr. Arar to Syria much of the evidence used to support the decision remains classified and it is reasonable to assume that Canadian information would be kept confidential. While there is no explicit reference to reliance on Canadian information, there is nothing in the decision that would indicate the Americans did not rely on Canadian information in deciding to deport Mr. Arar to Syria.

Exhibit P-117, Vol. 1, tab 25

Exhibit P-42, Vol. 1, tab 43

Testimony of Gary Loeppky, Transcript of Proceedings, July 28, 2005, p. 8728

Exhibit P-19, p. 71

279. The RCMP was under a duty to ensure that information supplied to foreign authorities was not used in a manner which would violate the human rights of Mr. Arar, a Canadian citizen. That duty is amplified in light of this ongoing sharing of information.

D. THE ROLE OF DFAIT

(i) Did DFAIT officials ignore the obvious warning signs with respect to the risk of Mr. Arar's deportation to Syria?

280. A review of all of the evidence clearly establishes that DFAIT ought to have been aware that there was a serious risk Mr. Arar would be deported to Syria and failed to take the necessary steps to protect him. Minister Graham, Gar Pardy, and Nancy Collins testified that had they been aware of the risk of deportation to Syria they could have taken steps which might have prevented it from happening.

Testimony of Bill Graham, Transcript of Proceedings, May 30, 2005, pp. 4922 - 4925
Testimony of Gar Pardy, Transcript of Proceedings, May 26, 2005, pp. 3965 - 3968
Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3217 - 3221

281. There were several warning signs which should have alerted DFAIT officials of the serious risk of Mr. Arar's deportation to Syria:

- a) On October 1, 2002, Mr. Arar's brother phoned Ms. Collins "in a state of panic". Taoufik Arar informed Ms. Collins that his brother had called him from MDC and had advised him that he would be deported back to Syria. It was conveyed to Ms. Collins that both Taoufik and Maher Arar were extremely afraid that Mr. Arar would be deported to Syria.

Exhibit P-42, Vol. 1, tab 10

- b) On October 1, 2002, DFAIT officials learned that Mr. Arar was being held at the Metropolitan Detention Centre (MDC). The next day, Ms. Girvan ,

confirms that Mr. Arar was being held in the secure wing at MDC. Ms. Girvan testified that she was aware that the secure wing at MDC was used to hold detainees suspected of terrorist links and that this was where Mr. Baloch and Mr. Jaffri had been detained. Ms. Collins testified that she did not attach any significance to the fact Mr. Arar was being held at MDC but acknowledged that she was aware that a Canadian detainee accused of terrorism had been held on the ninth floor. The ninth floor of the MDC was notorious. The mere fact that Mr. Arar was detained there ought to have been sufficient to indicate the seriousness of his situation.

Exhibit P-42, Vol. 1, tabs, 9 and 16

Testimony of Maureen Girvan, Transcript of Proceedings, May 11, 2005, pp. 1740 - 1741

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3016 - 3017, 3042

- c) The prison officials at MDC would not tell Maureen Girvan the “charges” over the phone. She was told to fax a request but that the fax would not be attended to that day. Ms. Girvan noted that this was highly unusual as she would normally be informed of the charges by phone.

Exhibit P-42, Vol. 1, tab 11

Testimony of Maureen Girvan, Transcript of Proceedings, May 11, 2005, pp. 1778 - 1779

- d) On October 1, 2002, Consul Girvan spoke with a supervising officer at the INS Public Affairs Office. She was informally advised that “...this case was of a seriousness that should be taken to the highest level, i.e. he suggested”

that our Ambassador in Washington should contact the Dept. of Justice.”

Both Ms. Girvan and Ms. Collins testified that this was the first time they had ever heard this type of suggestion. The unprecedented nature of this warning was ample notice that this case required extraordinary and urgent intervention at the highest levels. Moreover, as indicated above, based on the evidence of Minister Graham such intervention had a reasonable possibility of success.

Exhibit P-42, Vol. 1, tab 11

Testimony of Maureen Girvan, Transcript of Proceedings, May 11, 2005, pp. 1785 - 1787

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3032 - 3033

- e) On October 3, 2002, Ms. Girvan learned during her consular visit with Mr. Arar that two immigration officers had informed Mr. Arar at the airport that they were going to send him to Syria. DFAIT officials were thus made aware that Mr. Arar's fear of deportation to Syria was not the generalized fear of a dual national but rather in response to a specific threat levelled at him by two INS officials.

Exhibit P-42, Vol. 1, tab 31

Testimony of Maureen Girvan, Transcript of Proceedings, May 11, 2005, pp. 1852, 2210

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3017 - 3019

- f) During the consular visit, Ms. Girvan also became aware of the serious nature of the allegations levelled at Mr. Arar. The document given to her by

Mr. Arar informed her that this was an immigration matter pursuant to the INA and that it involved an allegation that Mr. Arar was inadmissible to the U.S. because he was alleged to be a member of Al-Qaeda.

Exhibit P-42, Vol. 1, tab 31

Testimony of Maureen Girvan, Transcript of Proceedings, May 11, 2005, pp. 1828 - 1829, 1840

- g) DFAIT officials had instituted a travel bulletin on September 10, 2002 whereby they warned of intrusive measures by the U.S. under the NSEET program regarding persons born in certain countries of certain nationalities, including Syrians.

Exhibit P-87

- h) DFAIT officials were aware or should have been aware of the risk that Mr. Arar could be held incommunicado and tortured if he was deported to Syria, both generally from country reports on human rights and also specifically from the statements of Mr. El Maati.

Exhibit P-192

Testimony of Gar Pardy, Transcript of Proceedings, May 26, 2005, p. 3362

282. DFAIT officials ignored the numerous warning signs of Mr. Arar's imminent risk of deportation to Syria. Instead, DFAIT officials placed undue and unwarranted reliance on the actions taken in the Baloch and Jaffri cases. However, there were significant differences between those cases and that of Mr. Arar. In neither of those cases were DFAIT officials informed by a superior INS officer that this case should be taken to the

highest level. Those cases did not involve allegations of inadmissibility under s. 235(c) of the INA. To the best knowledge of Mr. Pardy, the RCMP were not involved with Mr. Baloch or Mr. Jaffri. In neither of those cases did the detainee express fear to Canadian officials of being deported to a country other than Canada, although Mr. Pardy testified that he learned just before he testified that in one of the cases there was a threat made to deport to Pakistan and not to Canada.

Testimony of Maureen Girvan, Transcript of Proceedings, May 16, 2005, pp. 2180, 2169, 2171

Testimony of Gar Pardy, Transcript of Proceedings, May 24, 2005, pp. 3317 - 3318, 3323 - 3324, 3356 - 3365, 3297, 3299 - 3300

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3205, 3200

283. In our submission, DFAIT officials were not alert and alive to the clear signals that the U.S. would deport Mr. Arar to Syria and they failed in their mandate to provide consular protection to Mr. Arar.

(ii) Did DFAIT fail to take immediate or sufficient measures to prevent Mr. Arar's deportation to Syria?

284. All of the warning signs discussed above were known to DFAIT officials as of October 3, 2002, after the consular visit of Consul Maureen Girvan. The serious risk of harm that could befall a person deported to Syria, especially a person suspected of being a member of Al-Qaeda, should have been known to DFAIT officials. The minute that Mr. Arar expressed to DFAIT officials that INS officials had threatened to send him to Syria, DFAIT officials should have been aware of or conducted the

necessary research on Syria.

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3151, 3161, 3148 - 3149
Exhibit P-42, Vol. 1, tab 31

285. Mr. Pardy testified that by mid August he was aware that another Canadian, Mr. El Maati, had stated to consular officials that he had been severely tortured while he was detained incommunicado in Syria. Mr. Pardy was also aware of the public record detailing Syria's poor human rights record. Mr. Pardy, therefore, was well aware prior to Mr. Arar's deportation of the serious risk of harm that Mr. Arar would face if he was deported to Syria.

Testimony of Gar Pardy, Transcript of Proceedings, May 24, 2005, pp. 3300 - 3304
Exhibit P-192
Exhibit P-27
Exhibit P-29

286. While Ms. Girvan and Ms. Collins may not have been acutely aware of the human rights record in Syria, this information was readily available to them from a variety of easily accessible resources: Mr. Pardy, Ms. Pastyr-Lupul, the internet, other public resources and DFAIT's own report on Syria. These consular officers ought to have informed themselves of the human rights situation of Syria once it was raised as a possibility.

Testimony of Maureen Girvan, Transcript of Proceedings, May 16, 2005, pp. 2111 - 2114
Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, p. 3166

287. Despite knowing the serious allegations of inadmissibility levelled against Mr. Arar, Ms. Collins never looked up s. 235(c) of the INA nor asked anyone for information on this section of the INA (i.e. a representative from the DOJ or a senior immigration officer at the

Canadian Embassy in Washington). Had she researched this section of the INA, DFAIT officials would have been aware that it contained an expedited removal process and that deportation was imminent.

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3206 - 3209, 3213

288. From the moment that DFAIT officials first learned that Syria was a possible place of deportation, and especially after Mr. Arar personally communicated to Ms. Girvan, DFAIT officials should have contacted the appropriate American officials to ascertain whether Syria was a possibility and to advise the American officials that Canada would not tolerate the deportation of a Canadian citizen to Syria. No such conversation took place.

Testimony of Gar Pardy, Transcript of Proceedings, May 26, 2005, pp. 3965 – 3968
Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, p. 3223

289. Had inquiries and representations occurred at a high level, as suggested by a senior INS official, Mr. Arar's deportation to Syria would not have occurred. Indeed, high level consultations are precisely what is contemplated by the Monterrey protocol. Although the protocol does not prevent the United States from deporting a Canadian to third country, Minister Graham testified that such action would be unlikely once there were high level representations by the Canadian government. Indeed, Minister Graham testified that had DFAIT officials read the situation differently and alerted him to the possibility of Mr. Arar's deportation to Syria, he would have intervened at the highest levels of the American government.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4922 -

4925

290. Besides direct representations from Minister Graham, other steps could have been taken at lower levels. A diplomatic note could have been sent to the Department of State raising the concern that Mr. Arar had been threatened with deportation to Syria. A diplomatic note was never sent. Several witnesses testified that diplomatic notes are used only in extreme cases as they often result in the “freezing” of informal communications at lower levels. However, once the seriousness of the case had become apparent, a diplomatic note ought to have been sent.

Testimony of Maureen Girvan, Transcript of Proceedings, May 11, 2005, pp. 1796 - 1803

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3048 - 3049

291. Mr. Pardy testified that he had two other options at his disposal had DFAIT officials contemplated that deportation to Syria was a possibility: the Canadian Ambassador in Washington could have met with a senior person in the Department of State to make representations or he might possibly call in the American Ambassador in Ottawa on the issue. Neither of these steps were taken.

Testimony of Gar Pardy, Transcript of Proceedings, May 26, 2005, pp. 3965 - 3968

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3217 - 3221

292. Mr. Commissioner has heard evidence from Ms. Collins and Mr. Pardy about an alleged statement made by an American official in a meeting with DFAIT officials to the effect that there was nothing Canada could have done to stop Mr. Arar’s deportation. The

Commissioner should approach this statement with some suspicion given that there is no reference to such a statement having been made in any document before the Commission. Even even if such a statement was made, it should have no bearing on the Commissioner's findings. It is completely speculative that DFAIT officials could have done nothing to stop the deportation, given that no steps were taken and that a senior INS official recommended that DFAIT officials take the matter to the highest levels. Further, as stated above, the Canadian government believes that high level consultations as contemplated by the Monterrey agreement will prevent a situation like Mr. Arar's from occurring again. Last and most importantly, the Commissioner need not make a finding about whether or not the actions of DFAIT officials would have conclusively prevented Mr. Arar's deportation; the Commissioner need only consider whether the actions taken were adequate. In our submission, the evidence clearly discloses that DFAIT officials took absolutely no steps to prevent Mr. Arar's deportation to Syria.

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, p. 3235

293. In light of the above evidence, Counsel for Mr. Arar would ask that the Commissioner make a finding of fact that DFAIT officials failed to discharge their duty to Mr. Arar by not taking any steps to ensure that Mr. Arar would not be deported to Syria.

RECOMMENDATIONS

294. We would request that the Commissioner recommend a clear protocol be put in place for consular officials when a Canadian detainee abroad expresses their fear of being deported to a country other than Canada, which would include consultations with

knowledgeable DFAIT officials concerning the human rights situation of the country the Canadian detainee fears being deported to.

(iii) Were DFAIT officials aware of or should DFAIT officials have been aware of the U.S. Policy of Extraordinary Rendition?

295. In our submission, it is very suspect that no one in DFAIT, the Department in charge of our foreign policy, knew the specifics of our closest ally's policy of extraordinary rendition. Mr. Pardy testified that he was aware of the practice of rendition by the U.S. whereby they would bring individuals to the U.S. for appropriate judicial action, sometimes with the cooperation of a foreign government and sometimes without, but he was not aware of the U.S. taking an individual to a third country for the purposes of interrogation. None of the other DFAIT officials who testified professed any knowledge of the practice of extraordinary rendition and, in fact, Ms. Girvan testified that she only learned about the policy recently in the context of this inquiry. It is alarming that consular officials did not know of a policy that might affect the execution of their duties.

Testimony of Gar Pardy, Transcript of Proceedings, May 24, 2005, pp. 3304 - 3311

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3223 - 3224

Testimony of Maureen Girvan, Transcript of Proceedings, May 11, 2005, p. 1776

296. In light of the publicly available materials on rendition, the Commissioner will need to assess whether DFAIT officials did know of this policy or should have possessed this knowledge.

Exhibit P-122

Exhibit P-16

Exhibit P-120

Testimony of Julia Hall, Transcript of Proceedings, June 6, 2005, pp. 5568 - 5573

RECOMMENDATIONS

297. If the Commissioner finds that DFAIT officials did not know but should have been aware of the U.S. policy of renditions, we would request that the Commissioner recommend that the consular officials in Ottawa responsible for each region produce quarterly bulletins or newsletters advising the consular officials located in their region of any recent developments in foreign policy in that region that may touch upon the consular mandate.

(iv) Did DFAIT officials fail to adequately advise the Minister and other government officials of the risk that Mr. Arar was going to be deported to Syria?

298. It is clear from the evidence before the Commissioner that at no time prior to Mr. Arar's deportation was the Minister, the Deputy Minister or the Assistant Deputy Minister advised of the risk that Mr. Arar could be deported to Syria. Given the candid and direct advice given to DFAIT officials by a superior INS official that this matter should be addressed at the highest levels, in our submission, DFAIT officials should have heeded this advice and raised this matter at higher levels in the Canadian government.

Testimony of Minister Bill Graham, Transcript of Proceedings, May 30, 2005, pp. 4138 - 4140

RECOMMENDATIONS

299. We would request that the Commissioner recommend that when there is a suggestion by a foreign country that a matter should be raised at high levels of the Canadian Government that officials should promptly communicate this information to high

level officials in the Canadian Government.

(v) Should the DFAIT reports on Human Rights be shared with the RCMP and CSIS? Should DFAIT reports on Human Rights be available to the public?

300. DFAIT reports on human rights should be accessible to the RCMP, CSIS and to the public. As is the case with the U.S. Department of States country reports on human rights, there is no good reason why Canada's assessment of the human rights of the various countries it deals with should not be publicly accessible. Should the Commissioner determine that there are legitimate political reasons for not disclosing these reports to the public, at a minimum the RCMP and CSIS must have access to these reports. The evidence in this inquiry is that information sharing with foreign entities increased dramatically post-9/11. This underscores the need for all departments of government to have the knowledge of the human rights situation of potential countries they may deal with.

301. As discussed in further detail below, there is a complete lack of knowledge on the part of RCMP officers about the human rights situation in Syria, a country in which the RCMP contemplated sharing information with and contemplated conducting interviews of detainees. The testimony of several RCMP witnesses discloses that it is not within their mandate to know about the human rights situations in the countries they may have dealings with. Inspector Cabana testified that there were no specific training programs on human rights. Mr. Loeppky confirmed in his testimony that the RCMP do not receive human rights

reports from DFAIT. While we agree that RCMP officers need not be experts in this area, since policing is crossing international boundaries more and more often, RCMP officers must at the very least have access to the DFAIT report on human rights for a country they are contemplating exchanging information with.

Testimony of Gary Loeppky, Transcript of Proceedings, July 27, 2005, p. 8454

Testimony of Mike Cabana, Transcript of Proceedings, June 29, 2005, pp. 7835 - 7836, 8009 - 8010

Testimony of Rick Flewelling, Transcript of Proceedings, August 23, 2005, p. 9836

Testimony of Sergeant Ron Lauzon, Transcript of Proceedings, August 23, 2005, p. 10178

RECOMMENDATIONS

302. We ask that the Commissioner recommend that DFAIT human rights reports be distributed to the RCMP, CSIS and be accessible to the public.

303. We also request that the Commissioner recommend that the RCMP mandate that investigators who are contemplating or are involved in sharing information with a particular foreign agency be required to read the DFAIT human rights report on the country as well as other publicly accessible reports.

(vi) Did DFAIT fail to take any action against American authorities with respect to Mr. Arar's conditions of detention in the United States and the lack of consular notification?

304. Mr. Arar was detained in the United States on September 26, 2002. It was not until October 1, 2002 that Mr. Arar was able to use the phone. Despite asking and signing for consular access and despite requesting access to a lawyer, the Canadian consulate was

not notified of Mr. Arar's detention and Mr. Arar was denied access to a lawyer for four days. It was only after Canadian officials made several inquiries with U.S. officials that the detention of Mr. Arar was acknowledged. This did not occur until days after Mr. Arar's detention.

Exhibit P-42, Vol. 1, tabs 8, 10, 34 & 38

305. The U.S. acted in contravention of Article 36 of the *Vienna Convention*. Article 36 required the U.S. to notify the Canadian Consulate without delay once Mr. Arar indicated that he was asserting his right to consular services. In the *Avena* case, the international court determined that the failure to notify the sending state until after 40 hours was in violation of Article 36 of the Convention. Moreover, Professor Forcese testified that if a person was held incommunicado and was not allowed to communicate with consular officials that would also violate Article 36 of the Convention.

Testimony of Craig Forcese, Transcript of Proceedings, June 6, 2005, pp. 5491 - 5492, 5525

306. A disturbing aspect of the lack of consular notification and access is that it was not only in Mr. Arar's case that the Americans have not notified the Consulate of the detention of a Canadian; there is a pattern, particularly after 9/11, of this type of behaviour. Ms. Girvan testified that she has never been notified by MDC in any case involving the detention of a person on the 9th floor of MDC. Mr. Pardy testified that this matter had been raised with the Americans post 9/11. However, we would submit that it is apparent that raising the issue had very little effect.

Testimony of Gar Pardy, Transcript of Proceedings, May 24, 2005, pp. 3275 - 3300

Testimony of Maureen Girvan, Transcript of Proceedings, May 12, 2005, p. 2120

307. With respect to the conditions of detention, it is apparent from the evidence that Ms. Girvan was generally aware of the extremely restrictive conditions Mr. Arar was being kept in and Ms. Girvan acknowledged that it was her duty to ensure that the detention of a person does not fall below minimum international standards for detainees. Ms. Girvan was aware that the prisoners wore bright orange jumpsuits and were shackled at the ankles and wrists. She was aware of the fact that prisoners were confined to their cells 23 hours a day with one hour for exercise. She was aware of the restrictions on privacy and admitted there was not much privacy for her consular visit.

Testimony of Maureen Girvan, Transcript of Proceedings, May 12, 2005, pp. 2149, 1744, 2154, 2144

308. Despite Mr. Arar being at least the third Canadian detainee on the ninth floor of MDC, Ms. Girvan was not aware of some of the more restrictive conditions of the detention such as stationary cameras in every cell, being shackled in the cell and very restricted limits placed on the number of phone calls, including legal calls. Although there was no specific notation concerning the conditions of detention of Mr. Arar, Ms. Girvan testified that she had reported extreme conditions of confinement to Ms Collins and to her boss. There is no evidence that Ms. Girvan made any inquiries from Mr. Arar or the other previously released Canadian detainees about the specific conditions of their detention on the ninth floor. Moreover, in April 2003, subsequent to Mr. Arar's deportation to Syria, the U.S. Inspector General released a report that criticized the treatment of detainees after

September 11, 2002 in MDC. Although this report details the treatment of detainees, Ms. Girvan had not read the report during the course of her duties but rather only in preparation for this inquiry.

Exhibit P-164

Testimony of Maureen Girvan, Transcript of Proceedings, May 12, 2005, pp. 2142 - 2143, 2148, 2133

309. The Canadian Government may have protested Mr. Arar's deportation to Syria with the Americans but they never protested the treatment of Mr. Arar while he was detained in the United States. This ought to have been done.

RECOMMENDATIONS

310. Counsel for Mr. Arar ask the Commissioner to recommend that consular officials keep abreast of the conditions of the detention centres in which Canadians are detained.

(vii) Does the evidence disclose a systematic failure to communicate amongst the RCMP, DFAIT and CSIS which contributed to Mr. Arar's deportation to Syria?

311. This submission does not refer singularly to DFAIT but to all of the actors involved during Mr. Arar's detention in the United States. Of grave concern to counsel for Mr. Arar is the clear lack of communication between the principle government actors during this critical period. The evidence discloses that each of them had a vital piece of information that was not shared with any other agency. Had there been proper coordination between the three, it is very likely that the information would have led to a high level intervention by the Minister which might have prevented Mr. Arar's deportation.

312. Former Director Elcock and Deputy Director of Operations Hooper testified that they were aware of the practice of rendition, albeit they were not aware of the exact factual scenario that occurred in the Arar case. This information would have been of vital importance both to the DFAIT and RCMP officials involved in the case who all claimed to be completely ignorant of the policy.

Testimony of Ward Elcock, Transcript of Proceedings, June 21, 2004, pp. 163 - 164
Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10600

313. DFAIT officials were aware of the threat of deportation to Syria early on but CSIS denied any advance knowledge of this and the RCMP officers involved claim that the information only came to them on October 7 or 8, 2002 (although this is a disputed fact). Clearly if CSIS and RCMP officials had been aware of the threat earlier it would have affected their conduct in this matter.

Exhibit P-19, p. 25
Testimony of Richard Roy, Transcript of Proceedings, August 22, 2005, pp. 9655 - 9656

314. Finally, the RCMP officers from AOCANADA and CID were well aware of the nature of the investigation involving Mr. Arar and were aware of the allegations that he was a member of Al-Qaeda long before DFAIT officials discovered this. Ms. Girvan testified that she was not aware of any RCMP involvement in the case. Ms. Collins testified that had she been aware of the RCMP involvement in this case, it may have been helpful in assessing the seriousness of the case.

Testimony of Maureen Girvan, Transcript of Proceedings, May 12, 2005, pp. 2090,

2231

Testimony of Nancy Collins, Transcript of Proceedings, May 19, 2005, pp. 3165 - 3166

315. We urge that the Commissioner conclude that there was an alarming lack of coordination between the different agencies involved in this matter and that better coordination might have prevented Mr. Arar's deportation to Syria.

RECOMMENDATIONS

316. We urge the Commissioner to recommend that in all cases involving Canadians detained abroad where there are allegations of membership in or connection to a terrorist organization, that there be mandatory coordination and communication of all relevant information between the government agencies involved including *inter alia* CSIS, the RCMP and DFAIT.

IV. PERIOD 3: MAHER ARAR'S DETENTION IN SYRIA - OCTOBER 21, 2002 to OCTOBER 6, 2003

A. INTRODUCTION

317. The start of this period is marked by the official acknowledgment by the Syrian authorities on October 21, 2002 that Maher Arar was in custody in Syria. The Syrian authorities stated that Mr. Arar had arrived in Syria earlier that day from Jordan. Nonetheless, during the first consular visit, Maher Arar told Leo Martel that he had been in Jordan for only a few hours after being deported from the United States on October 8, 2002.

Exhibit P-42, tab 125

318. Mr. Arar was not released from Syrian custody until October 5, 2003. For more than 10 months, he was detained in darkness in an unlit, underground, grave-like, windowless cell measuring 3 feet wide, 7 feet long and 6 feet high. Throughout this period, efforts were made by DFAIT to secure his release. The Commissioner must consider and make factual findings about whether the efforts made by DFAIT were sufficient in the circumstances and whether other efforts should have been made. The Commissioner must also consider and make findings of fact about whether the actions of the RCMP and/or CSIS impeded efforts to have Mr. Arar returned to Canada.

B. THE ROLE OF DFAIT OFFICIALS

(i) The Consular Framework

319. Diplomatic protection – the right of the Government of Canada to formally intervene or extend protection to Canadian citizens abroad, including those detained abroad – is provided by the Department of Foreign Affairs. The provision of consular services by the Department is the principal vehicle for providing this protection. Only the Department of Foreign Affairs has any legal mandate with respect to these services.

Exhibit P-11, tab 22, p.6

Testimony of Minister Graham, Transcript of Proceedings, June 2, 2005, pp. 4788 - 4789

Section 10 (2) (a), (g), (h), *Department of Foreign Affairs and International Trade Act, Revised Statutes, 1985, C.E-22, 1995, C.5, S.2.*

Vienna Convention on Consular Relations, Exhibit P-11, tab, 13

320. The provision of consular services to Canadians detained abroad has a number of

purposes, including:

- a) ensuring that a representative of the Government of Canada (the Consular Officer) has physical access to a detained person;
- b) ensuring that a person detained is either released or charged with an offence and tried in accordance with minimum international standards;
- c) ensuring an end to arbitrary detention if someone is not charged; and
- d) ensuring that a person released from detention is permitted to return or is returned to Canada if that is the person's wish.

These are all "core functions" of Consular Services. Correspondingly, the entitlement to such services is considered to be a right of Canadian citizens who are detained in foreign states.

Khadr v. Canada, [2005] F.C.J. No. 1315 (T.D.); [2004] F.C.J. 1391 (T.D.)
Testimony of Minister Graham, Transcript of Proceedings, June 2, 2005, pp. 4789 - 4793

321. The provision of Consular Services necessarily entails consular staff seeking and obtaining information from the detainee. If consular staff are to be effective, they have to engage the detainee in discussions about the nature of the charge, the basis of the charge and indeed the detainee's response to the charge(s). No one other than the detainee's lawyer is likely to receive this information.

Testimony of Minister Graham, Transcript of Proceedings, June 2, 2005, pp. 4793 - 4794

322. The Department of Foreign Affairs, both on its website and in publications made widely available in Canada, makes clear to persons receiving consular assistance who are

detained that the information given to consular officials will remain completely confidential and is protected under Canada's *Privacy Act*. Departmental publications note that this information will not be passed onto anyone other than consular officials concerned with the person's case without their permission. The person is also told that while the RCMP or other police agencies may have their own contacts and acquire information about the circumstances of a person's detention abroad, this information will not come from consular officials. This promise of confidentiality fosters the relationship of trust between the Consular official with his or her "client".

A Guide for Canadians Imprisoned Abroad, Exhibit P-11, tab 14, p.4
Testimony of Minister Bill Graham, Transcript of Proceedings, June 2, 2005, pp. 4797 - 4801

323. Indeed, Minister Graham testified that as a matter of principle consular officials endeavour to do everything possible so they can ensure the security and well being of the individual who is detained in a foreign state. This would, of course, include assisting by gathering information or evidence in Canada that could assist a detainee or his lawyer in responding to the charge or mitigating the penalty. Minister Graham also testified that in circumstances like Mr. Arar's, whose interrogation by the Syrians led to a statement that raises issues of coercion and involuntariness, the Department would provide that statement to Mr. Arar and his defence counsel in order that they would be able to challenge the voluntariness and reliability of that statement in any trial.

Testimony of Minister Graham, Transcript of Proceedings, June 2, 2005, pp. 4794 - 4797
Testimony of Gar Pardy, Transcript of Proceedings, May 26, 2005, pp. 3961 - 3963

324. In addition, Canadians are promised that consular officials will assist in ensuring that

they have access to counsel. A list of lawyers, with expertise in the type of case involved and who have represented Canadians in the past is made available to the detainee.

A Guide for Canadians Imprisoned Abroad, Exhibit P-11, tab 14, p.6
Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, p. 11389

325. Canadians are also told that consular officials will help them communicate with family, friends as well as their "representative". They will also make every effort to ensure that a person receives adequate nutrition, medical care and dental care and that the conditions of their confinement are consistent with the standards of the host country and minimum international standards.

A Guide for Canadians Imprisoned Abroad, Exhibit P-11, tab 14, p.6

326. Of course, in approaching the question of minimum standards, any consular official would have to have regard to, among other things, the publication by the Office of the High Commissioner for Human Rights of the "Standard Minimum Rules for the Treatment of Prisoners", adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council by Resolution 663c (XXIV) of 31st July 1957 and 2076 (LXII) of 13th May 1977. These minimum standards include the following:

- a) The duty of any institution to keep a registration book identifying the reasons for a person's commitment to the institution and the authority therefore;
- b) That each cell where a prisoner is required to either live or work, shall have windows large enough to enable the prisoner to read by natural light and shall be constructed to allow entry of fresh air;

- c) Sanitary installation shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner;
- d) Adequate bathing and shower installations shall be provided so that every prisoner may be enabled or required to have a bath or shower as frequently as necessary for general hygiene, but at least once a week in a temperate climate;
- e) Prisoners shall be required to keep their persons clean and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness;
- f) Every prisoner shall be provided at regular hours with food of nutritional value adequate for health and strength, and of wholesome quality;
- g) Drinking water shall be available to every prisoner whenever he needs it;
- h) Every person who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits;
- i) All institutions shall have available the services of one qualified medical officer who has some knowledge in psychiatry;
- j) Services of a qualified dental officer shall be available to every prisoner;
- k) A medical officer shall see and examine every prisoner as soon as possible after admission and thereafter as necessary;
- l) Punishment for disciplinary offences shall not include corporate punishment, punishment by placing in a dark cell, and all cruel inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences;

- m) Prisoners shall be allowed under necessary supervision to communicate with family, reputable friends both by correspondence and by visits; and
- n) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with consular representatives of the State to which they belong.

Standard Minimum Rules for the Treatment of Prisoners, Exhibit P-11, tab 10
Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, p. 11318

327. Other international instruments such as the International Covenant on Civil and Political Rights and the Convention Against Torture (C.A.T.) address the prohibitions against torture and also any cruel, inhuman or degrading treatment or punishment. The International Covenant on Civil and Political Rights also secures the right of any person to liberty and their right not to be subjected to arbitrary arrest or detention. Persons who are detained or deprived of their liberty must be informed of the grounds and the detention must be in accordance with procedures that are established by law. These and other rights set the minimum international standards which are to govern detention and conditions of confinement. They are by definition matters of concern to any consular officer who is charged with the duty of protection of citizens detained abroad.

Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Exhibit P-11, tab 9
International Covenant on Civil and Political Rights, Exhibit P-11, tab 10
Standard Minimum Rules for the Treatment of Prisoners, Exhibit P-11, tab 10
Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11318 - 11328

328. Mr. Conrad Sigurdson, the current Director General of Consular Affairs, testified that when a Canadian consular official feels that a Canadian detainee is not getting fair

treatment, adequate nutrition, medical or dental care, the issue would initially be raised informally with local officials. Mr. Sigurdson testified that often an informal interest in these matters by consular officials will result in an improvement in conditions. If informal intervention does not work, then the issue must proceed to a more formal intervention such as the sending of a letter or a diplomatic note. Before a decision to raise the matter in a formal way is undertaken, the consular official would always consult with the Consular Affairs Division in Ottawa.

*Testimony of Conrad Sigurdson, Transcript of Proceedings, June 23, 2004, pp. 645
- 647*

329. Mr. Sigurdson also testified that when a consular official is located in a country that does not have a good human rights record and there is a suspicion that the detainee is being mistreated or abused, it is the obligation of the consular officer to monitor the well-being of the person. If there is any suspicion of maltreatment or mistreatment of the detainee he testified that the consular official would "make note of it". If informal intervention was not sufficient to cause a change in the person's conditions, then consular officials are trained to contact the Director General of Consular Affairs or other members of the Bureau who will work with the legal branch and other persons trained in the human rights field. They will work out different interventions.

*Testimony of Conrad Sigurdson, Transcript of Proceedings, June 23, 2004, pp. 647
- 648*

330. Mr. Sigurdson also testified that any consular official, particularly if they suspect mistreatment or torture, has a right to demand access to permit a confidential conversation with the detainee. While no international instrument guarantees such a confidential

communication, consular officials should make the request to see the detained Canadian alone and in circumstances where a full and candid discussion can occur. In fact, Canada's failure to do so in this case has occasioned adverse comments by the United Nations Committee Against Torture, which monitors compliance with *the C.A.T.*

Testimony of Minister Graham, Transcript of Proceedings, June 23, 2004, pp. 649 - 650
Exhibit P-246

331. Mr. Sigurdson testified that a consular officer should attend visits with a suspicious cast of mind so as to more readily discern abuse or mistreatment of a detainee. If he or she "suspects" possible abuse or mistreatment including torture, then the officer must inform headquarters in Ottawa, so the legal branch can review the case against the various international instruments and take appropriate steps.

Testimony of Conrad Sigurdson, Transcript of Proceedings, June 23, 2004, p. 665
Vienna Convention on Consular Relations, Articles 5 and 36, Exhibit P-11, tab 13

(ii) The Actions of Ambassador Pillarella

332. Ambassador Franco Pillarella was the Head of Mission in Damascus. As Ambassador he represented Canada in Syria and had the duty to supervise and direct the functions carried out by embassy personnel. One of the important functions was the provision of consular services to detained Canadians. He reviewed and signed off his approval of the reports of consular visits made by Leo Martel to Maher Arar. He gave advice to the Department of Foreign Affairs and other departments within the Government of Canada which had a direct impact upon the steps taken to assist Mr. Arar.

a) Failure to Identify Risk Factors Associated with Torture

333. Ambassador Pillarella acknowledged that neither he nor his consular officials received any training on how to detect the signs of torture. He did, however, suggest that he and Mr. Martel had ample “on the job training.”

Testimony of Ambassador Pillarella, Transcript of Proceedings, June 14, 2005, p. 6086

334. Nonetheless, Ambassador Pillarella testified that, although he had read public reports about Syria’s human rights record, he did not have “any indication that there were serious human rights abuses committed” in Syria. He was not aware of the Palestine Branch in 2002 and was not aware of its reputation. He also testified that he would have to have actual evidence that a detained Canadian was being mistreated or abused before he would raise the matter with the Syrian officials.

Testimony of Franco Pillarella, Transcript of Proceedings, June 14, 2005, pp. 6725, 6727 - 6728; 6740

335. At the time Mr. Arar was detained, Ambassador Pillarella was not aware that another Canadian, Mr. El Maati, had told consular officials in Egypt in August 2002 that he had been tortured while detained in Syria. Nonetheless, Mr. Pillarella testified that knowing this information would not have assisted him in his work for Mr. Arar:

So even the fact that Mr. El Maati might have said that he had been tortured, I don’t see how this would apply to this particular case because each case should be viewed separately. Maybe Mr. El Maati had been tortured. In this particular case, we did not have evidence that Mr. Arar was being tortured...

...and because Mr. El Maati might have been tortured, it doesn’t necessarily follow that Mr. Arar will have been tortured. If we had had any evidence of it, an inkling of evidence, maybe, but we did not have it.

Testimony of Franco Pillarella, Transcript of Proceedings, June 14, 2005, pp. 6725, 6727 - 6728; 6789, 6871

336. In fact, Ambassador Pillarella took the position a number of times that, without direct evidence of torture, he was not prepared to reach any conclusions about how the Syrian Military Intelligence were treating Mr. Arar. He repeatedly said that he simply did not know what happened to Mr. Arar: he did not know whether Mr. Arar was mistreated and did not know whether Mr. Arar was held incommunicado in Syria. Mr. Pillarella went further and testified that there was no indication or evidence that Mr. Arar was physically tortured by the Syrian Military Intelligence. He also said that they if he and Leo Martel, the consular officer who visited Maher Arar, had had even an "inkling" that Mr. Arar was tortured, they would have reported that to Ottawa, but they did not. Ambassador Pillarella gave this evidence despite knowing, *inter alia*, the following:

- (a) Mr. Arar was in Jordan for only a few hours and had been in Syria for almost two weeks before he was seen by consular officials;
- (b) Daniel Livermore, the Director General of ISD, was concerned from the beginning that Mr. Arar would be subjected to aggressive interrogation in Syria;
- (c) Mr. Martel was unable to meet with Mr. Arar in private;
- (d) Mr. Arar was not able to speak freely during the consular visits and was being controlled by the Syrians;
- (e) The interrogation of Mr. Arar was "intensive" at the beginning;
- (f) Mr. Arar looked to be resigned and submissive during the first consular visit;
- (g) Mr. Arar was being detained in isolation in an unknown location;

- (h) Mr. Arar's brother expressed concern to Myra Pasty-Lupul that Mr. Arar was being detained in darkness;
- (i) Mr. Arar was considered by the Syrians to be connected to the Muslim Brotherhood; and
- (j) Mr. Arar was being denied access to anyone other than consular officials

It is clear that Ambassador Pillarella was, at a minimum, incompetent to properly assess the risk Mr. Arar faced while detained in the Palestine Branch and, therefore, failed to take the necessary steps to secure his release as quickly as possible and further compromised Mr. Arar's security by continuing to deal with Syrian Military Intelligence. These dealings are discussed below. Ambassador Pillarella's demeanour, including his patrician arrogance, suggests he knew all along that Mr. Arar was being tortured or at serious risk of being tortured.

Testimony of Franco Pillarella, Transcript of Proceedings, June 14, 2005, pp. 6786 - 6788; 6822, 6833 - 6836; 6861
Exhibit P-134, tab 1
Exhibit P-42, tab 254

337. What is even more shocking is that when Ambassador Pillarella was faced with an actual allegation from the Syrian Human Rights Committee that Mr. Arar was being tortured in August, 2003, he sought a consular meeting to "rebut the allegations of torture." Ambassador Pillarella testified that he sought a meeting "simply to try to figure out whether these allegations were true or not." Nonetheless, given Ambassador Pillarella's inability or unwillingness to recognize earlier signs of ill-treatment by the Syrians, the Commissioner ought to find that he, and Mr. Martel, were only interested in disproving the suggestion that Mr. Arar was being or had been tortured while in Syrian custody.

Testimony of Franco Pillarella, Transcript of Proceedings, June 15, 2005, pp. 7003 - 7007

b) Receiving Information from Syrian Military Intelligence

338. Ambassador Pillarella was questioned about his pre-occupation with obtaining information about Mr. Arar from the Syrians. He testified that he sought out information to assist Mr. Arar:

...any information I could send back to Ottawa and say, "Look, this is what the Syrians claim" and this could be checked whether it was true or not, this would play -- or would be in favour of Mr. Arar.

Although Ambassador Pillarella denied asking the Syrian Military Intelligence to continue their interrogation of Mr. Arar, he did admit that he asked them for any information about Mr. Arar and any proof they had that Mr. Arar was affiliated with terrorists. He reiterated that the purpose of obtaining information from the Syrian authorities was to allow Canadian officials to verify the information by their own means. Despite this, Ambassador Pillarella never communicated to the Syrian Military Intelligence that, according to CSIS, the statement given by Mr. Arar was not damning evidence against him. Nor were efforts were made to provide the Syrian Military Intelligence with evidence that the allegations against Mr. Arar were false.

Testimony of Franco Pillarella, Transcript of Proceedings, June 14, 2005, pp. 6799; 6832; 6848 - 6849, 6856 - 6858; 6864 - 6866

c) Ambassador Pillarella's Role in Facilitating the Relationship between SMI and Canadian policing/intelligence agencies

339. The record is replete with examples of Ambassador Pillarella's willingness, perhaps

eagerness, to facilitate a relationship between Syrian Military Intelligence and the RCMP and CSIS. In fact, Ambassador Pillarella testified that it is his responsibility to “facilitate access” between Canadian and Syrian policing or intelligence agencies and to “open doors” for Canadian policing or intelligence officials with their Syrian counterparts. Ambassador Pillarella was unable to see any potential conflict between this aspect of his duties and his obligation to provide consular services

Testimony of Franco Pillarella, Transcript of Proceedings, June 14, 2005, pp. 6690 - 6697

340. In or about January, 2002, the RCMP Liaison Officer visited Syria to gather information in furtherance of their investigation of Mr. El Maati. Ambassador Pillarella was involved in the visit and introduced the Liaison Officer to someone in Syria or opened the doors for the officer. In September, 2002, Ambassador Pillarella met with members of AOCANADA and agreed to “facilitate any future requests to the Syrian government.” In early November, 2002, Ambassador Pillarella made inquiries with General Khalil about granting the RCMP permission to visit another detained Canada in custody. Ambassador Pillarella met with the CSIS officers when they travelled to Syria in November 2002.

Testimony of Franco Pillarella, Transcript of Proceedings, June 14, 2005, pp. 6742 - 6744

Notes of Inspector Cabana, Exhibit P-166, pp. 44 - 44A

Testimony of Inspector Cabana, Transcript of Proceedings, June 29, 2005, pp. 7871 - 7873

Exhibit P-138

Exhibit P-171

d) Conclusions

341. It is clear from the record and we request that the Commissioner make the following findings of fact:

- (a) In respect of consular affairs, Ambassador Pillarella was totally incompetent.
- (b) Ambassador Pillarella did not possess the skill, knowledge or sensitivity needed to properly assess and minimize the dangers faced by Canadians detained in Syria.
- (c) In the alternative, Ambassador Pillarella's testimony was completely lacking in candor in terms of his appreciation of the risk that Mr. Arar was tortured by the Syrian Military Intelligence.
- (d) Ambassador Pillarella improperly gave priority to intelligence gathering rather than the provision of consular services.
- (e) Ambassador Pillarella failed to appreciate that there was a conflict between his obligations to represent the interests of security and policing agencies in Canada and his duty to protect detained Canadian citizens from torture and mistreatment.
- (f) Ambassador Pillarella's explanation that he sought information from the Syrians to assist Mr. Arar is unbelievable in light of the fact that he took no steps to give information either to the Syrian Military Intelligence or to Mr. Arar's counsel that would help prove the allegations against him to be false.
- (g) Ambassador Pillarella failed to give priority to preventing the torture of a Canadian citizen or minimizing the risk that a Canadian citizen will be tortured.

- (h) While Mr. Arar was detained in Syria, Ambassador Pillarella never suggested that the Government of Canada protest any of Mr. Arar's conditions of detention and never took any steps to informally protest against these conditions.
- (i) Ambassador Pillarella was more interested in facilitating the relationship between Canadian policing and security entities and the Syrian Military Intelligence than he was in providing assistance to Mr. Arar or other Canadians detained in Syria.
- (j) Ambassador Pillarella acted as a conduit of information about Mr. Arar, and other detained Canadians, from Syrian Military Intelligence to Canadian security and policing agencies.
- (k) Ambassador Pillarella's conduct in relation to Mr. Arar and the other Canadians detained in Syria likely placed them at greater risk of interrogation and torture and likely prolonged their detention in Syria.
- (l) Ambassador Pillarella's conduct in relation to Mr. Arar placed him at greater risk of torture during interrogation.

RECOMMENDATIONS

342. We recommend that all Canadian representatives abroad be instructed that protection of Canadians abroad must take precedence over all other functions including intelligence gathering.

(iii) Failure on the part of DFAIT to advise the RCMP and CSIS about Country conditions

343. The Department of Foreign Affairs has an obligation to provide all aspects of the Government of Canada with accurate, complete and relevant information about a nation, including its human rights record, so as to inform policy and operational decisions. One aspect of this duty is to produce reports on the Human Rights Practices which can be made available to other departments.

344. In addition, the Canadian Embassy in Damascus prepares an annual report on the human rights situation in Syria. This document is used both within the Department and the Government of Canada to inform various foreign policy decisions. While Mr. Martel did not have direct input into the drafting of the 2003 report, he acknowledged that he was frequently consulted with respect to its contents and further asked to verify facts that were within his knowledge. While this document has been released in a highly redacted form, the portion dealing with Mr. Arar states as follows:

Allegations of torture and intimidation of detainees by policy and security services persist. Syria has been the target of much international criticism and pressure due to claims by Canadian Maher Arar that he was tortured during his almost 11-month detention here. Arar was detained by US authorities in late 2002 and deported to Syria via Jordan. According to statements made since his release in October of this year, Arar was kept in an unlit "coffin-like" cell, 3 feet wide, 6 feet long, and 7 feet high. While the Embassy saw no evidence of physical torture during meetings with him, Arar did tell an Embassy official following his release that he had a difficult first two weeks in Syrian custody while he was being interrogated. He told the Embassy that he had been mistreated during that period and that after that he had been left alone. Since his release, Arar has told the press that prison guards repeatedly beat him with a 2-inch thick electric cable and finally forced him to sign a confession prior to his release. He has announced plans to sue both the US and Syrian governments.

Exhibit P-242, tab 20

345. Mr. Martel acknowledged that this portion is in a number of respects incorrect. For example, Mr. Martel acknowledged that the statements made by Mr. Arar about the size of his cell (3 feet by 6 feet by 7 feet) were not made after his release, but rather at the August 14 consular visit. The report suggests that Mr. Martel was not told by Mr. Arar that he was beaten in his first two weeks of interrogation but merely that he had a “difficult time.” This is not true. As outlined below, Mr. Martel was told, either on August 14, 2002 or after Mr. Arar’s release, and on the plane back to Canada, that he was beaten during the first two weeks of his detention. The report also states that Mr. Arar was in custody in Syria for “almost 11 months.” This statement fails to take into account the 2 weeks during which Mr. Arar was held incommunicado by the Syrian Military Intelligence. In total, Mr. Arar was in custody in Syria for almost exactly 12 months. The Report’s description of Mr. Arar’s treatment also denigrated Mr. Arar’s horrific and inhumane treatment throughout his detention in Syria. No effort has been made to correct the errors despite the acknowledgment of their existence.

Exhibit P-242, tab 20, p.3

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11336 - 11345

346. There is also one troubling omission from the report. Government counsel has acknowledged that the 2003 Annual Report does not make mention of Mr. El Maati, who told the Consular Officer in Cairo that he had been tortured while in detention in Syria. In particular, Mr. El Maati described how he was “beaten (feet/legs) and tortured (electric shock) and forced to give false information” during his two and a half months in Syrian

custody.

Transcript of Proceedings, August 31, 2005, p. 11586
Exhibit P-192

347. In addition to preparing erroneous and incomplete country reports, the record suggests that DFAIT did not provide actual advice to either the RCMP or CSIS on the propriety of sharing information with Syrian Military Intelligence or on assessing information received from them. In fact, there appears to be a clear disconnect between what the RCMP know about the country conditions in Syria and what DFAIT believes they know about the country conditions in Syria. As a result, it appears that some members of the RCMP were not briefed about the country conditions and did not have the appropriate knowledge to assess whether information about Mr. Arar from the Project AOCANADA file ought to have been offered to the Syrian Military Intelligence. Similarly, they did not have sufficient information to evaluate information they received about Mr. Arar from the Syrian Military Intelligence.

348. Mr. Daniel Livermore, Director General of the Bureau of Security and Intelligence within the Department of Foreign Affairs, was asked whether anyone in DFAIT gave advice to the RCMP or CSIS about the reliability of the statement obtained by the Syrian Military Intelligence from Mr. Arar. Mr. Livermore responded as follows:

“I don't believe that the advice was tendered in that way. The document, such as it was, was passed to others to make their own assessment of the document and its own credibility.”

When it was suggested that this was the appropriate role of DFAIT, Mr. Livermore took the position that the RCMP “know full well how people are detained abroad and what the value

of the information that they may pass on is worth.”

Testimony of Daniel Livermore, Transcript of Proceedings, May 17, 2005, pp. 2566 - 2567

349. On the other hand, Inspector Cabana testified that he was unaware of the human rights record in Syria and relied on individuals from DFAIT with expertise in the area to provide advice. Inspector Cabana also testified that no such advice was received and further there was no discussion at the inter-agency meeting on November 6, 2002 about the possibility that the statement obtained by Ambassador Pillarella was the product of torture.

Testimony of Inspector Cabana, Transcript of Proceedings, pp. 8009 - 8013; 8034 - 8035

350. On the basis of this evidence, we ask the Commissioner to make the following findings of fact:

- (a) The 2003 Report on Human Rights, Democratic Development and Good Governance in Syria is deliberately inaccurate, incomplete and misleading;
- (b) Mr. Martel's failure to correct the inaccuracies reflect his persistent efforts to misrepresent what Mr. Arar told him about the conditions of detention, as discussed in further detail below;
- (c) DFAIT failed to provide adequate information and advice to the RCMP and CSIS that would have assisted them in evaluating the propriety of an information sharing agreement; and
- (d) DFAIT failed to provide adequate information and advice to the RCMP and CSIS in order to assist them in evaluating the reliability of any information

received from the Syrian Military Intelligence.

(iv) Mr. Martel's "Client" - Maher Arar

351. Leo Martel was the consular official in Damascus who provided consular services to Maher Arar during his year long detention in Syria. Mr. Martel was, therefore, responsible for ensuring Mr. Arar's well-being and protecting his legal rights. The record of Mr. Martel's service discloses a woefully inadequate attempt to ensure that Mr. Arar was not tortured or abused, had access to basic amenities in accordance with minimum international standards and had legal protection.

a) Training and Education

352. Despite the emphasis on ensuring the well-being of any detainee, Canadian consular representatives are not given any specialized training to identify the signs of mistreatment or torture. Mr. Martel had no special training in the detection of either physical or mental abuse. Consular officials like Mr. Martel were however aware that the "art" of torture, both physical and mental, utilizes means which ensure that the signs of such abuse are not readily detectible or visible. Modern techniques of torture leave no trace. In a recent review of consular services, one area of deficiency in the training of consular personnel was noted to be the absence of any focus on the identification or signs of either mental or physical torture. Consular officers who participated in the study readily recognized the difficulty they had in recognizing such abuse. Mr. Martel agreed that he did suffer from the same deficiencies.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11300 - 11309

353. While Leo Martel did obtain field experience through visiting detainees at police stations, he testified that he had never visited any detention facility run by either the military, or intelligence or security agencies.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11310 - 11313

354. In order to discharge the duties of a consular officer properly, Mr. Martel agreed that the consular officer had a "duty to inquire" about the conditions of detention and the legal basis for it. Mr. Martel was aware that in some cases only limited information can be obtained from the detainee directly. In such cases, information has to be obtained from other sources including other detainees who have been released, human rights reports, and the prison authorities. Mr. Martel also agreed that his duties extended to knowing the size of the detainee's cell, whether the detainee was being held in general population or solitary confinement, whether the detainee had access to visitors particularly family, and whether the detainee had access to any physical exercise, medical care, hygiene, adequate warmth, and fresh clean water.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11316 - 11327

355. Mr. Martel also testified that he would want to know the legal basis of a detainee's detention, whether a charge existed or whether the person was arbitrarily detained, whether that person had access to legal counsel, and whether that legal counsel had the tools to

promote the fair trial of an accused person. Certainly, Mr. Martel agreed that consular service extended to protesting, among other things, poor conditions of confinement and the denial of access to a lawyer among other things.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11316 - 11327

b) Access to Members of the Family

356. Mr. Martel was keenly aware of the importance of family visits which he understood formed a crucial link between a detainee and the outside world.

Testimony of Leo Martel, Transcript of Proceedings, p. 11374

357. Mr. Martel received a message from the consular section in Ottawa informing him that Mr. Arar's sister and her husband were traveling to Damascus in June 2003 and seeking the Embassy's assistance in obtaining access to Mr. Arar. Mr. Martel was directed by Ottawa Consular Affairs to forward a diplomatic note from the Canadian Embassy to the Syrian Foreign Ministry in order to assist in obtaining access.

Exhibit P-42, Vol. 5, tabs 432 and 444

358. Despite these instructions no diplomatic note was sent. Instead, Mr. Martel went on holidays. He testified that his assistant had a telephone call with the Ministry of Immigration and was told that because Mr. Arar's family were both Syrian and Canadian citizens, their access to Mr. Arar had to be obtained through the Ministry of Immigration and not through the Syrian Department of Foreign Affairs with whom the Embassy dealt. There was no

record kept of this conversation. Thereafter, the message given to the family was simply that the Syrian authorities took the position that family could not have any access to Mr. Arar.

Exhibit P-42, Vol. 5, tabs 453; 457

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005 pp. 11377 - 11380

359. Ultimately Mr. Martel conceded that no steps were taken to protest the denial of access to Mr. Arar by members of his family. Mr. Martel did not tell Mr. Arar during the August 14, 2003 visit that his family had been in Syria and had unsuccessfully sought access to him. There can be no excuse for Mr. Martel's failure to tell Mr. Arar of his family's efforts to visit him. This information could only have comforted him in circumstances where he was completely isolated.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, p. 11383
Exhibit P-42, Vol. 6, tabs 507 and 508

360. On the basis of this evidence, the Commissioner ought to make the following findings of fact:

- (a) Mr. Martel and the Consular Bureau in Ottawa failed to take appropriate steps to secure access to Mr. Arar by members of his family;
- (b) Mr. Martel, without excuse, failed to inform Mr. Arar of efforts made by his family to make contact and visit him; and
- (c) Mr. Martel failed to recognize the significant psychological benefit that Mr. Arar would derive from knowing his family members tried to visit him.
- (d) Mr. Martel and the Consular Bureau failed to protest this denial of access or

take other steps to rectify it.

c) Access to Counsel

361. Universally, consular officials recognize the importance of ensuring that the detainee has counsel and reasonable access to that counsel. Once represented, the obligations of consular officials do not end. Consular officers continue to support the work of the lawyer who is representing the detainee and to ensure the detainee's well-being.

362. Early in Mr. Arar's detention in Syria, Mr. Anwar Arar, a member of Mr. Arar's extended family and a lawyer in Syria, sought assistance from the Embassy in his efforts to locate and get access to Maher Arar. He contacted the Embassy on or about November 2, 2002, wanting to go with consular officials to meet with Mr. Arar at the up-coming consular visit of November 12, 2002.

Exhibit P-42, Vol. 2, tab 163, 166

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11364 - 11365

363. Remarkably, the efforts of Mr. Anwar Arar to contact or get access to Maher Arar were never communicated to Mr. Arar at the November 12, 2002 consular visit. Nor were any steps undertaken by Mr. Martel in Syria to attempt to facilitate Mr. Anwar Arar's access. Mr. Martel clearly had formed the view from his conversations with the Syrians that any such efforts would be futile. However, he did not even request that the Syrians give access to Mr. Anwar Arar. Mr. Martel did not seek or receive any instructions from Ottawa to either informally or formally protest this refusal of access. Furthermore, there is no record that

either Mr. Martel or Ottawa consular officials considered the risks and benefits of pursuing Mr. Arar's right to counsel at this time. It is not an answer for the Government of Canada to state that their access to Mr. Arar was so vulnerable at this stage that a simple request could not be made for access or that Mr. Arar could not be informed of Mr. Anwar Arar's inquiries.

Exhibit P-42, Vol. 2, tabs 163, 191

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11364 -

11373

364. No steps were taken to secure legal assistance for Mr. Arar even when Leo Martel learned in December 2002 that one of the allegations that had surfaced against Mr. Arar in December 2002 was that he was a member of the Muslim brotherhood. Although Mr. Arar had not yet been charged with the offence of belonging to the Muslim Brotherhood, Mr. Martel knew these allegations were treated very seriously by the Syrians and could often result in punishment of up to twelve years in prison (in fact, in some cases, it is a capital crime in Syria). Mr. Martel was asked whether any steps were taken by him to discuss with headquarters gathering evidence to show that such a claim was clearly wrong. Mr. Martel stated that because he did not have the allegations in writing and/or did not have access to the "dossier" there was nothing concrete and therefore no point in exploring evidence that might be gathered in Canada to prove Maher Arar was not affiliated with the Muslim Brotherhood. Additionally, Mr. Martel said he did not believe what was told to him about Mr. Arar's alleged connection to the Muslim Brotherhood -- therefore did not pass it on.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11399 -

11402

Exhibit P-42, Vol. 3, tab 253

365. Before August 14, 2003, no steps were taken by either the Embassy in Damascus or by headquarters who were in regular contact with Mr. Arar's wife, Monia Mazigh, to retain counsel in Syria to represent Mr. Arar at any pending trial. Mr. Arar was not even given a list of prospective lawyers. No conversation had taken place between Mr. Arar and Leo Martel as to the wisdom of retaining someone who could defend Mr. Arar if and when he was charged. Mr. Martel explained that there was no reason to give Mr. Arar the list because he was unable to contact anyone outside the jail. Indeed, no efforts were even made to have Mr. Arar execute a power of attorney which was necessary for Mr. Arar's family to access certain personal information in Canada and/or retain counsel in Syria.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11388 - 11390; 11401 - 11404

366. Leo Martel testified that while Mr. Arar languished in detention from October through to August, the Embassy had some verbal discussions with one of the lawyers they had on permanent retainer. This lawyer, who reviews contracts and other commercial agreements entered into by the Embassy informed them that there was nothing that any Syrian lawyer could do for Mr. Arar during his detention. The lawyer, while not an expert in criminal, security or human rights law, did not recommend that the Embassy consult anyone else and simply said that because Mr. Arar was a citizen of Syria as well as Canada, there simply was nothing that could be done. In other words, the Syrian authorities could detain him as long as they wanted and there was no legal recourse available. No note of any such legal consultation was reported back to Ottawa. Nor was Maher Arar advised of this

consultation. This breach of minimum international standards was not referred to the legal department of the Department of Foreign Affairs and no meaningful intervention was planned to rectify it.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11390 - 11399

367. On August 14, 2003 (after allegations had been made in the international media that Mr. Arar had been the victim of torture) Ambassador Pillarella was able, once again, to meet with General Khalil. Ambassador Pillarella was told that Mr. Arar would likely be put on trial within a week. Before the consular visit on August 14, 2003, Ambassador Pillarella and Mr. Martel received information about the allegations against Mr. Arar. However, Mr. Martel did not inform Mr. Arar of the substance of any allegations. Mr. Martel explained that the conversation with Mr. Arar was highly controlled and he had been told from the very beginning that he could not "discuss the case".

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11388, 11404 - 11406
Exhibit P-42, tab 507
Exhibit P-132, tab 13
Exhibit P-134, tab 24

368. At the consular visit of August 14, 2003 Mr. Martel was informed by Mr. Arar that his wife, Monia Mazigh, would select and arrange for counsel. The next day, Dr. Mazigh's choice of counsel was forwarded to Damascus. Two names were given to Mr. Martel with a clear statement that Dr. Mazigh would prefer to retain Mr. Haythem El Maleh, a lawyer known for his work in human rights. Despite this, no immediate action was taken by Mr.

Martel to communicate with Mr. El Maleh and the Embassy, through Mr. Martel, continued to pursue what was felt was a better choice of counsel -- a more influential lawyer. It was only after September 9, 2003, when Dr. Mazigh, confirms for a second time, her choice of counsel that the Embassy accede to her choice contacting Mr. El Maleh and asking that he keep the Embassy informed of any developments.

Exhibit P-42, Vol. 6, tabs 514, 526, 519 and 551
Testimony of Gar Pardy, Transcript of Proceedings, May 26, 2005, p. 3934 - 3935
Exhibit P-42, tabs 552; 554

379. However, the Embassy did nothing to actually assist Mr. El Maleh in preparing Mr. Arar's defence. While Mr. El Maleh searched for access to information the allegations against Mr. Arar and any details about the pending trial, Ambassador Pillarella, Mr. Martel and the Consular Bureau in Ottawa, took no steps to provide him with the information that they had obtained about the allegations. No efforts were undertaken to see whether the Department of Foreign Affairs, including ISI and ISD, had information that they could provide to rebut the suggestion that Mr. Arar was associated with the Muslim Brotherhood, trained in Afghanistan at a Mujahadeen Camp in 1993, or was a member of Al-Qaeda. Mr. Martel was told that Mr. Arar could challenge any statement he made at his trial but did not provide Mr. El Maleh with any information about the "confession" allegedly obtained from Mr. Arar which had been delivered, in summary form at least, to Ambassador Pillarella in November 2002. No consideration was given to sharing information about the meeting of AOCANADA investigators in Afghanistan with Mr. Khadr, who reviewed photos of persons, including Mr. Arar and did not identify him as being one of the persons he had seen in the training camps of Afghanistan. In fact, no information left the files of the Department of

Foreign Affairs, its Consular Bureau, ISI or ISD, the Ambassador's office, the RCMP, or CSIS to help in the defence of Mr. Arar. The Department, therefore, ran a serious risk that Mr. Arar would face charges unrepresented and without access to information necessary to his defence because of its failure to act.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11414 - 11436

Transcript of Proceedings, June 16, 2005, pp. 7456 - 7460

380. Based on the above submissions and summary of the public evidence, the Commissioner ought to make the following findings of fact:

- (a) Mr. Martel and the Consular Bureau failed to take seriously the need to retain a lawyer to be available whenever charges might be laid.
- (b) Mr. Martel, the Ambassador, and the Consular Bureau failed to provide assistance to Mr. Arar or his counsel by failing to give any information in the possession of the Department of Foreign Affairs or elsewhere within Government, that would have permitted him to resist the allegations made by the Syrians.
- (c) Mr. Martel and the Consular Bureau failed to obtain expert legal advice about the possibility of obtaining legal recourse for Mr. Arar.
- (d) Mr. Martel failed to consult the legal department of the Department of Foreign Affairs.

d) The Call for a Fair and Open Trial

381. On September 25, 2003 the Foreign Affairs Minister, Bill Graham, spoke to a member of the press and said:

They have taken the position that he is guilty of offences under Syrian law, in which case the proper thing to do is to prosecute him and enable him to defend himself. I have been given assurances by them that it would be a civil process, not a military process and that this will be open.

Human rights organizations disagreed with Minister Graham that Mr. Arar would get a fair trial as the US Department of State Report make clear that Syrian courts do not observe constitutional provisions safeguarding defendant's rights. Mr. El Maleh was also interviewed and said he could get no information about the charges, the actual court date and further had not been permitted to see his client.

Exhibit P-42, Vol. 7, tab 581
Exhibit P-27
Exhibit P-28

382. Upon learning of the Minister's comments, Mr. Martel contacted the Consular Division in Ottawa noting that he had not been asked to convey to the Supreme State Security Court Canada's expectation that the judicial process in Mr. Arar's case be both fair and transparent. Mr. Martel sought express instructions on whether such a concern should be conveyed and opined that the Syrians would consider this an interference in Syrian internal affairs because Mr. Arar was a Syrian national.

Exhibit P-42, Vol. 6, tab 574

383. The Record does not disclose that any meaningful assurances where ever given to the Minister through diplomatic channels.

384. A diplomatic note was sent from to the Syrian Ministry of Foreign Affairs requesting permission for the Canadian consul to be present during Mr. Arar's trial and asking that Mr. Arar's lawyer be given full access to the dossier. Additionally, the diplomatic note requested that the consul continue to have regular access to Mr. Arar. The diplomatic note did not contain any call for a fair, open or transparent trial process.

Exhibit P-42, Vol. 6, tab 575

385. On September 24, 2003 an e-mail message from the Consular Division was forwarded to the Minister's office pointing out that Mr. Arar's wife, Amnesty International and others had expressed concerned about the Minister's position that he was "pleased that the trial was going forth, as this will be an opportunity for Maher Arar to defend himself in court." As is pointed out:

His lawyer cannot get a hold of the case files to defend his client, we have not been informed of a court date, nor the charges, and all signs indicate that the trial would be a closed one. That could very well mean that our Embassy officials will not be allowed in the courtroom when the charges are announced, or to hear Mr. Arar's lawyer when given the opportunity to defend his client."

The Consular Bureau cautioned Mr. Fry, of the Minister's office, that while persons may hope for a "fair and judicial process", the Supreme State Security Court is known for its secret procedures and lack of appeal. In this same e-mail, it is reported that Robert Fry told Dr. Mazigh that the Minister's statement was really a stratagem in preparation for his

upcoming meeting with the Syrian Foreign Minister. Mr. Martel said he did not appreciate or understand the strategy behind having the Minister make public announcements with respect to his confidence in there being a fair trial for Mr. Arar in circumstances where it was obvious that none was likely.

Exhibit P-42, Vol. 6, tab 576

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11450 - 11451

386. Mr. Martel testified that concerns about the trial process were matters that should be dealt with at a higher level. Indeed it was contemplated that a telephone call was needed between the Prime Minister of Canada and the President of the Syrian Republic, Mr. Bashar Al Assad. Briefing notes prepared for the Prime Minister in anticipation of such a call suggested that the Prime Minister urge the Syrians to ensure that Mr. Arar's trial is open and meets international recognized standards of fairness. No such telephone call was ever made.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11446 - 11450

Exhibit P-42, Vol. 7, tab 590

387. On this basis of this public evidence, the Commissioner ought to make the following findings of fact:

- (a) Minister Graham's statement that Mr. Arar should stand his trial and that he had been assured that it would be an open trial was reckless given what was known about the practices of the Supreme State Security Court;
- (b) Minister Graham had no assurances from the Syrian government that Mr. Arar's trial would be either fair or open;

- (c) Minister Graham's statements were intended to and in fact did mislead the public about the nature of legal proceedings in Syria.
- (d) A Minister of the Crown should never support the trial of a Canadian citizen in a country where a fair trial is not possible.

e) The Consular Visits

388. Mr. Martel, a consular official with some twenty years experience, was the only consular official to visit Maher Arar during his detention in Damascus. Indeed, Mr. Martel was the only person, except for a brief visit in April 2003 with two Canadian parliamentarians, who saw Mr. Arar for almost a year. He was, therefore, Canada's eyes and ears in their efforts to provide diplomatic protection to Mr. Arar.

389. While Mr. Martel received no special training on the conditions of detention in Syria or in recognizing torture or abusive treatment of detainees, he did have considerable field experience and more importantly was well aware of the reputation of Syrian Military Intelligence. He describes himself as a person who kept abreast of what was going on and understood the fate of political dissidents who were arrested, arbitrarily detained and tortured. He agreed that the fate of persons who were viewed as security threats and held by military intelligence would be no different. Mr. Martel was aware of the public position of the Syrian Government that they opposed the actions of Al-Qaeda and were supporting the United States in the "war on terror". Mr. Martel was also aware after his first visit with Mr. Arar that he was being held by Syrian Military Intelligence and had been deported from the United States to Syria based upon alleged involvement in terrorist activities. Finally, Mr.

Martel was aware that when the Syrians acknowledged Mr. Arar was in their custody, he had been “a disappeared person” for almost two weeks.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11478 - 11487

390. While Mr. Martel had this general knowledge, neither the Ambassador nor anyone else brought to his attention Mr. Livermore’s concern, which had been raised directly with Ambassador Pillarella, that Mr. Arar may be the subject of “aggressive questioning”. Mr. Martel was also not aware of Mr. El Maati’s complaint, made to the Canadian Consul in Cairo in August 2002, that he had been tortured by the Syrian Military Intelligence during the course of an interrogation and forced to sign a false statement.

Exhibit P-134, tab 1

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, p. 11472 - 11476

Exhibits P-192; P-83, tab 1, p.182

391. It is not the intention of counsel in the course of these submissions to conduct a detailed analysis of each of the consular reports prepared by Mr. Martel. It is, however, understood that these reports formed the basis upon which Canadian officials acquired information about Mr. Arar’s conditions of confinement and his general well-being. This information was used by the Department of Foreign Affairs, including the Minister, to inform their decisions about Mr. Arar and about the steps that they would take to assist in obtaining his release and return to Canada. It is submitted that the following facts should be found by the Commissioner in respect of Mr. Martel’s observations and consular reports:

a) Given the duty of a consular officer to provide accurate information in respect

of a detainee, the reports are woefully inadequate;

- b) Mr. Martel brought optimism rather than scepticism to his evaluation of Mr. Arar's position which literally blinded him to any reasonable interpretation of both Mr. Arar's behaviour and his conditions of confinement;
- c) Mr. Martel never clearly identified the obvious and necessary limitations on his observations which would severely limit any conclusions that could be drawn about Mr. Arar's well-being and treatments;
- d) Mr. Martel never clearly explained that the Syrians set very strict limits which prevented him from ever discussing Mr. Arar's case and also the details of his conditions of confinement.

392. There is nothing in the reports to suggest that Mr. Martel ever tried to analyze or assess the observations he was able to make about Mr. Arar's condition and behaviour. The first consular visit is the most obvious example of a complete inability to read and interpret Mr. Arar's true situation. Mr. Martel mindlessly catalogued that he did not know where Mr. Arar was detained; that he was seated at some distance; that he was not free to answer questions; that he parroted words spoken or dictated to him by the Syrians; that he appeared resigned and submissive; and that his eye movements seemed to be trying to convey information to Mr. Martel. However, he drew no accurate conclusions about the significance of these observations, which should have led him to conclude and report that there was a serious risk Mr. Arar had been or would be tortured. When Mr. Martel left

the first consular visit, he and the Ambassador interpreted these observations of Mr. Arar to mean that Mr. Arar was “healthy”. This is a gross failure to record, observe and interpret what a consular officer should understand as “red flags” of abuse and torture. Instead, if Mr. Martel’s evidence is accepted, both he and Ambassador Pillarella concluded that Mr. Arar was not tortured.

Exhibit P-42, Vol. 2, tabs 130 and 131

393. At no time did Mr. Martel, the Ambassador or anyone in the Government of Canada seek a confidential meeting with Mr. Arar. While it is acknowledged that this may well have been refused by the Syrians, no request was made let alone any protest undertaken. This failing can only be regarded as utterly inexcusable. Consular services provided to Mr. Arar fell well below the standards that should be expected of such officers. As a result, the Minister of Foreign Affairs was not told about of the evidence that, during the initial stages of these visits, Mr. Arar was likely the victim of abuse and/or torture.

Exhibit P-42, Vol. 2, tab 129, p. 7

394. However, the same cannot be said for Mr. Gar Pardy, the Director General of Consular Affairs, who read and evaluated these consular reports in Ottawa. Mr. Pardy testified that he could read between the lines and did not need Mr. Martel to tell him of the risk that Mr. Arar was the victim of torture. This was his working assumption. If, however, this is the case, which is not disputed, it is shocking that this working assumption was not clearly articulated and made known to those ultimately responsible for making decisions about the steps to be taken to secure Mr. Arar’s release and return to Canada. It is also

shocking that he did not enlighten Leo Martel and Franco Pillarella. Perhaps it was not necessary for Mr. Pardy to do so because both Leo Martel and Franco Pillarella were well aware of the risks but chose not to report or act upon them.

Testimony of Gar Pardy, Transcript of Proceedings, May 26, 2005, pp. 3885 - 3886

395. Perhaps the most egregious failure of insight lay in the failure to appreciate the significance of Mr. Arar's incommunicado detention between October 8 and October 22, 2002. At the first consular visit on October 23, 2002, Mr. Martel recorded the following in his note:

After several negative attempts it was possible to obtain some information about his whereabouts from the time of his arrest in New York City. Arar indicated he had been detained in the USA for two weeks and then transferred under escort by private plane to Jordan. When asked why Jordan had been the destination, he said that there had been last-minute problems with the aircrafts or there was some other difficulties and Jordan was chosen by the USA authorities. When prompted further for answers, the Syrians told him in Arabic he was not to answer those questions. He said he only stayed in Jordan for a couple of hours before being taken to the Syrian border. He would therefore have been detained in Syria for the past two weeks, contrary to what we had been led to believe.

In an update issued the same day, the Minister of Foreign Affairs was told that Mr. Arar appeared to be healthy, that Mr. Arar had been transferred to Jordan by private plane and that it was "not clear" from the conversation exactly how long Mr. Arar had been in Syria. This is clearly false.

Exhibit P-42, Vol. 2, tab 130
Exhibit P-42, Vol. 2, tab 129, p.7

396. The failure of Departmental officials to tell the truth to the Minister of Foreign Affairs remains a very troubling matter. The mis-information provided to the Minister may be the

result of a decision not to challenge or offend the Syrians, thereby allowing them to save face. If this true, however, this decision was not made by a Minister of the Crown but rather by Mr. Martel or Ambassador Pillarella. It was clear that the Syrians wanted Canada to believe that Mr. Arar had arrived in Syria only a short time before the first consular visit. This was pressed upon Mr. Pillarella in a meeting with Vice-Minister Mouallem on October 31, 2002. Any statement to the contrary would have contradicted public statements made by the Syrian Government. This does not, however, explain why Mr. Martel and Ambassador Pillarella did not accept Mr. Arar's statements that he arrived in Syria on October 8, 2002 as evidence that he had been tortured or aggressively interrogated, as Mr. Livermore had feared.

Exhibit P-42, Vol. 2, tab 142
Exhibit P-134, tab 5

397. On December 12, 2002, Mr. Arar's brother, Bassam, conveyed to consular officials in Ottawa his concern that Maher Arar was being held underground and had no light. This clearly raised the issue of inhumane conditions. The defence or explanation offered by the Department, through Myra Pastyr-Lupul, about why no question was posed to Mr. Arar or his Syrian captors about the specific aspect of his detention was that they were "not allowed to ask direct questions". Those who provided consular services were so fearful that the Syrians would close the door, they blinded themselves to Mr. Arar's true conditions and failed to make any inquiry of him or others about conditions of confinement that directly related to the question of whether Mr. Arar was the victim of torture.

Exhibit P-42, tab 254
Testimony of Myra Pastyr-Lupul, Transcript of Proceedings, July 29, 2005, pp. 9029
- 9034

398. Even devices that could have been used to garner further information about Mahar Arar's well-being, such as the taking of a photograph, were not pursued. Although Mr. Martel was instructed by Myra Pastyr-Lupul to make inquiries about the possibility of taking a photograph of Mr. Arar for his wife, no such request was ever made. Indeed, at the visit where Mr. Martel was instructed to raise the issue of the photograph with the Syrians and did not, Mr. Arar wrote to his wife that he felt "desperate and helpless". Mr. Martel did not interpret this as a sign about his mental health. Nor did Mr. Martel ever make an inquiry to confirm that the reading material provided by Mr. Martel to the Syrians for Mr. Arar's benefit was ever given to him. Even a simple ruse -- raising a topic for discussion covered in the reading material -- could have given Mr. Martel a clue that Mr. Arar had seen none of the material given.

Exhibit P-42, vol. 3, tabs 246; 256

f) The August 14, 2003 visit

399. The consular visit on August 14, 2003, which occurred after a lengthy period without any consular access, bears special scrutiny. This visit occurred after allegations of the torture of Mr. Arar had been made in the international media.

400. On July 24, 2003, Myra Pastyr-Lupul brought to Gar Pardy's attention a Syrian Human Rights Committee report which alleged that Mr. Arar had been the victim of torture. Shortly thereafter, a letter dated July 29, 2003 was forwarded to Dr. Mazigh, Mr. Arar's wife, which stated that her husband had been tortured. At a press conference held on

August 7, 2002, Dr. Mazigh and Alex Neve, Executive Director of Amnesty International, demanded that the Government recall Ambassador Pillarella from Syria.

Exhibit P-42, tab 478; 486; 489, 496 and 573.11

401. On August 7, 2003, Ambassador Arnous, the Syrian Ambassador to Canada, was contacted by the Department of Foreign Affairs and formal concerns were expressed about the torture allegations that had been made. Ambassador Pillarella then contacted high-ranking members of the Department of Foreign Affairs, and proposed that a meeting with Mr. Arar would "help us rebut any recent charges of torture". This note was not sent to Gar Pardy.

Exhibit P-42, tab 502

402. As a result of a meeting between Ambassador Pillarella and General Khalil, the head of Syrian Military Intelligence, a decision was made by the Syrians to permit Mr. Martel a further visit with Mr. Arar. This consular visit occurred in the presence of General Khalil, an interpreter and two of General Khalil's aides. Part of the discussion occurred in Arabic, a language Mr. Martel professes to have only a rudimentary working knowledge of.

403. Following the visit with Mr. Arar, Mr. Martel sent a report to Ottawa. In his report, Mr. Martel stated, "we have questioned Arar as much as possible on his detention condition".

Mr. Martel then reported as follows:

He confirmed he had not been beaten nor tortured. He also said he had not been paralyzed. When asked to explain he could not find another word for it. He also said his long detention had destroyed him mentally. He indicated

that as far as he knew he was not receiving a worse treatment than that given to other prisoners. According to the report, General Khalil informed Mr. Martel that Mr. Arar's case would be going to court within a week and that he would be free to object to any part of his interrogation transcript. General Khalil also stated that Mr. Arar could be represented to a lawyer of his choice. There was a brief discussion around the possibility of future visits and the General ominously stated that any other consular visits would have to be granted by a higher authority.

Exhibit P-42, tabs 507

404. Mr. Martel did not, however, qualify the description of Mr. Arar's statements as he did during his testimony. He testified that he did not know whether Mr. Arar was "being forced to say that or if he was speaking freely" when he said he was not beaten nor tortured. Mr. Martel went on to say as follows:

I think that if he was being mistreated, I doubt that he would freely have told me. That's certain.

Testimony of Leo Martel, Transcript of Proceedings, August 30, 2005, p. 11197

405. Mr. Martel's contemporaneous notes of the August 14, 2003 visit are more detailed.

They read as follows:

Present conditions -- I have not been paralyzed -- not beaten -- not tortured.
Very beginning, very little
3 x 6 x 7
sleeping on ground. Mentally destroyed

These notes belie the "good news" message forwarded to the Consular Affairs Division in Ottawa. It is even more shocking that Mr. Martel sent Ms Pasty-Lupul an e-mail later on

August 14, 2003 which stated that Mr. Arar “looked physically normal and I have seen no trace of violence on the parts of the body that can be seen.” This is clear evidence that Mr. Martel was not capable of accurately assessing Mr. Arar’s situation. It seems that only a bloodied body would have lead Mr. Martel to conclude that Mr. Arar was the victim of torture or caused him to make a note of it.

Exhibit P-42, Vol. 6, tabs 508 and 511

406. Why Mr. Martel, who now admits that Mr. Arar told him that he was living in a 3 x 6 x 7 cell and sleeping on the ground, did not tell the Department these facts on August 14, 2003, is inexplicable. The Commissioner ought to reject outright Mr. Martel’s assertion that he simply slipped up, forgot, and that it didn’t just click. There are other, more sinister reasons. As a result of information received during the August 14, 2003 visit about an imminent trial, Mr. Martel would have understood that Mr. Arar’s prolonged detention in Syria was all but certain. In other words, Mr. Martel would have believed that Maher Arar would never be in a position to make public statements about his mistreatment. Confident that Mr. Arar’s voice would be silenced, the consular report prepared by Mr. Martel and approved by Ambassador Pillarella rebuts any allegation that the Syrians were using torture, preserves intelligence interests in dealing with Syrian Military Intelligence, deflects any criticism of the RCMP’s release of information to the US (the CIA), and allows the public face of government to pronounce to an eager public that Mr. Arar disavows any suggestion he was tortured.

407. Ultimately and unpredictably, the Syrians released Mr. Arar in early October 2003.

He travelled back to Canada with Mr. Martel, who pressed him for details of his treatment. Mr. Arar made it clear that he did not want to discuss the details of his experience. Mr. Martel found Mr. Arar to be a broken and fragile man. Mr. Arar was even afraid to leave the plane in Jordan en route to Canada. This fear in itself is a powerful statement of Mr. Arar's sense of vulnerability produced by prolonged mental torture.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, p. 11461

408. On October 7, 2003 and prior to Mr. Arar's meeting with the Minister and his public statement, Mr. Martel was asked to brief members of the Department about the conversations he had had with Mr. Arar on his trip back to Canada from Syria. Peter McRea, John McNee, Mark Bailey and David Dyet attended this briefing and made notes of Mr. Martel's description of what he had been told by Mr. Arar on the plane back. These senior officers in the Department of Foreign Affairs all made similar observations of Mr. Martel's description of what Mr. Arar told him during the plane ride to Canada. Mr. Peter McRea wrote as follows:

What he told me:
3 x 7 x 6, thin mattress, Military intelligence centre
HQ underneath -- not a jail -- in the dark
8 mos. there
then Saniga [Sednaya] -- paradise
torture -- tire not true, beating with wires not true
mental torture
beaten occasionally
stopped interrogating after 2 wks.

Mr. John McNee made the following notes:

Sednaya prison = cell=> paradise
Def'n of Torture?
- legal -- PCO?

(Syr. Close to turning him)

- mental cruelty
 - beaten occasionally => angry, slapped around in first 2 weeks
 - interrogation in first 2 weeks
 - Jordan: not CIA, but Jord. Milit.
- Did the interrog. (6hours) (slapped around there)

Mark Bailey in a much shorter version of the notes wrote:

- conditions of detention poor, but not actual physical Abuse; occasionally beaten during interrogation
 - did _____ give Syrians Arar's name?
- Mr. Dave Dyet wrote as follows:
- Always kept in the dark, didn't get the magazines
 - moved to prison where it was "paradise"!
 - no tire or beatings with wire.
 - "Brain has been destroyed", he was beaten occasionally (and especially in the first 2 weeks)

Robert Fry, who had particular responsibilities in respect of consular affairs matters wrote:

- 3x6x7 high - thin mattress
- no lights, no toilets, no water
- in Mil Int. HQ in the dark
- 3 times/day toilet/water
- wash once/week in the dark also
- couldn't read (until April)
- ...
- tire not true or electric chock
- heating with wires
- was mental torture - brain destroyed
- beaten occasionally but nothing too serious -- slapped for first 2 weeks
- stopped interrogating him

Each of these observers also noted that Maher Arar was reported to have denied being associated with any terrorist organization or having travelled to Afghanistan.

409. Mr. Martel testified that he did not dispute that he made these various statements in the October 7, 2003 meeting or that they reflected what Mr. Arar told him. He did not make any notes at the meeting or during his conversations with Mr. Arar. Mr. Martel explained his later failures to mention that Mr. Arar had told him that he had been beaten during the early stages of his detention while under interrogation were the result of a normal lapse of human memory. The disclosure of the notes made by his colleagues forced Mr. Martel to concede that Mr. Arar told him he was beaten while in detention in Syria. But for these notes, Mr. Martel would have persisted in denying that he had ever received this information from Mr. Arar. In fact, numerous documents prepared or reviewed by Mr. Martel after the October 7, 2003 meeting state that Mr. Arar's assertions that he was tortured were either false or exaggerated. Mr. Martel also claimed that Mr. Arar was motivated by an interest in obtaining money through lawsuits. For example, three short weeks after the October 7, 2003 meeting, Mr. Martel reported his version of events to Mr. Sigurdson, the new Deputy Director of Consular Affairs, Robert Fry and the new Ambassador in Damascus. In this memo dated November 3, 2003, Mr. Martel repeated that Mr. Arar's torture allegation is inconsistent with statements Mr. Arar made to him on August 14, 2003. Mr. Martel opined that Mr. Arar censored himself in order to protect their regular consular visits. Mr. Martel also said that Mr. Arar told him the visits had been essential and kept him alive. Without these visits, he would eventually have been unable to remain in detention and would have committed suicide. Stating the obvious, Mr. Martel suggested that Mr. Arar's statements immediately after his release, when he was not in the presence of Syrian Military Intelligence officers, were more reliable including those statements made on the flight home. Then in relation to discussions on the flight home, Mr.

Martel wrote:

Martel pressed Arar for answers on the question of torture. He confirmed that he had not been beaten nor were electrical shocks used on him. He stated "they have other means" but refused to elaborate. He, however, described the several months of solitary confinement at the Military Intelligence Detention Centre which he said had mentally destroyed him.

Mr. Martel goes on to describe in somewhat greater detail the absence of light, the size of the cell, the lack of access to toilet and hygiene facilities. Entirely absent from his report is any reference to the fact that he was told that Mr. Arar was beaten by Syrian Military Intelligence during the early phase of his detention and while under interrogation - indeed, the opposite is clearly stated.

Exhibit P-42, Vol. 7, tab 640

Testimony of Leo Martel, Transcript of Proceedings, August 30, 2005, pp. 11200 - 11207; 11213 - 11216

410. On November 17, 2003, Mr. Martel responded to a chronology publically issued by Amnesty International on behalf of Mr. Arar, which describes Mr. Arar's treatment and also the consular visit of August 14, 2003. Mr. Martel sent his response to a wide variety of persons including Mark Bailey, Peter McRea, John McNee, all whom were at the October 7, 2003 briefing. Mr. Martel points out an "important inaccuracy" in the chronology. He states that Mr. Arar is wrong when he says: "The consul asks if he has been tortured and Arar replies 'yes, of course -- at the beginning'." Mr. Martel reiterated that Mr. Arar only said the following:

Prison conditions have been more difficult in the past than they are now. I have not been beaten nor tortured, I have not been paralyzed, my long

detention has destroyed me mentally.

Mr. Martel conveniently does not point out that Mr. Arar told him on August 14, 2003 that he was living in a 3 x 6 x 7 cell and sleeping on the floor. He also failed to mention that Mr. Arar told him, either during the visit or while in the plane, that he was beaten during the early states of interrogation. None of the persons who had attended the October 7, 2003 briefing raised the inconsistency or corrected the record.

Exhibit P-42, tab 720

411. Later, on November 18, 2003, Mr. Fry communicated by e-mail with Mr. Martel, exploring further what exactly had been said during the August 14, 2003 visit. In answering this query, Mr. Martel reiterated that Mr. Arar said he had not been beaten but that he was unable to ask directly about the issue of torture. Mr. Martel went on to say, "I must also mention that after his release and on the way back home he never mentioned he had been beaten during the first two weeks of his detention. When prompted on this question, he simply said they have other means." As the notes of the October 7, 2003 debriefing establish, Mr. Martel's claim with respect to the conversation in the airplane returning to Canada is simply false.

Exhibit P-42, Vol. 8, tab 725

412. In response to a specific request from the Minister, a formal memorandum of information was prepared describing the contents of the consular visit on August 14, 2003. Again, Mr. Martel describes the visit without regard to any reference that Mr. Arar told him he lived in a 3 x 6 x 7 cell and slept on the floor. It was reiterated for the Minister's benefit

that Mr. Arar had not said he had been beaten, tortured or paralyzed during this meeting. No one pointed out to the Minister, anywhere in the memorandum, that on the return flight Mr. Arar had told Mr. Martel he was beaten during his interrogation in the first two weeks of his detention in Syria.

Exhibit P-42, Vol. 8, tab 740

413. On the very last day of the inquiry a document was produced which was described as being the notes of a February 8, 2004 interview with Mr. Martel. In this interview, Mr. Martel expressed his anger at Mr. Arar and those who suggested that Canadian Consular Services were not adequate. He stated to the interviewer that in his many years of consular services Mr. Arar had received more attention, including input from the Prime Minister, visits by senators and other senior DFAIT officials, than any other consular case. He attributed to Mr. Arar a change in his story linked to lawsuits and to pressure groups with political agendas. Indeed, the interviewer noted that Mr. Martel went so far as to call Mr. Arar a liar and stated that when he attended the inquiry he would gladly describe the inconsistencies and irregularities of Mr. Arar's statements.

Exhibit P-243

414. In paragraph two of this exhibit the public official interviewing Mr. Martel states that Mr. Arar told him that during his first two weeks in custody the Syrians had obtained everything from him and they thereafter left him alone. Mr. Martel went on to state that he had been told by Mr. Arar that the Syrians had beat him on the soles of his feet, elbows and places where there would be no scarring with a thick, black, plastic cable. Further, that the

Syrians appeared satisfied with his answers and did not do or engage in any more physical punishment or interrogation after this. This paragraph was only unredacted during the course of Mr. Martel's testimony -- the final witness of the inquiry.

415. Remarkably, Mr. Martel's position was that this statement was never made in respect of Mr. Arar, but rather another person, Mr. Nurredin. He attributed his comments, calling Mr. Arar a liar, motivated by lawsuits and the political agenda of certain pressure groups, to the fact that he had the lawsuit in which he had been named a defendant on his desk when he had this conversation with the public official and he was disappointed. If the conversation occurred on February 8, 2004 (a matter asserted by Commission counsel and information derived from the *in camera* hearings), there can be no doubt that Mr. Martel is lying. His animus towards Mr. Arar could not have been generated by receipt of the lawsuit in which he was a named defendant because the lawsuit simply was not in existence at that time. Indeed, the lawsuit was not filed in the court until April 2004.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, 11347 - 11358

416. It is respectfully submitted that at a minimum, Mr. Martel's failure to acknowledge the true nature of his communication with Mr. Arar on August 14, 2003 and thereafter in the aircraft can be reasonably explained by his fear that he would be in serious difficulty having failed to disclose important information to the Department, having caused his Minister to be publically embarrassed and having caused other persons to act on information which was ultimately proven to be false. Undoubtedly, Mr. Martel sought to perpetrate his lies

because of a concern that his failure to report these matters may give rise to findings of civil liability. If Mr. Martel and Ambassador Pillarella were the eyes and ears of Canada that would protect Maher Arar, there is no doubt that Canada was both blind and deaf.

Exhibit P-243

416. On the basis of all of the public evidence, the Commissioner ought to find as follows:

- a) Mr. Martel was incompetent to perform his duties as a consular officer in Syria in that he lacked the necessary skill, experience, and sensitivity to detect torture.
- b) Mr. Martel failed to recognize obvious signs that Mr. Arar was physically and psychologically tortured.
- c) In the alternative, Mr. Martel knew that Mr. Arar was likely physically tortured during his initial detention in Syria.
- d) Mr. Martel's reports of his visits with Mr. Arar are inaccurate, incomplete and designed to mislead his superiors in Ottawa.
- e) Mr. Martel intentionally hid from the Consular Bureau and the Minister of Foreign Affairs evidence that Mr. Arar was physically tortured and subjected to conditions of detention that themselves amounted to torture.
- f) Mr. Martel intentionally and persistently denied that he was told by Mr. Arar that he was beaten during the first two weeks of his detention.
- g) Ambassador Pillarella approved the consular reports sent back to the Ottawa Bureau.
- h) Ambassador Pillarella did not alert Mr. Martel to Mr. Livermore's express

concern that Mr. Arar would be subject to “aggressive” interrogation.

- i) The Ottawa Consular Bureau, in particular, Myra Pasty-Lupul, did not forward Mr. El Maati’s complaint of torture to the Damascus Embassy.

(v) Sharing Consular Reports

417. Despite the assurance of confidentiality and the provisions of the *Privacy Act*, it is clear that copies of some of the consular visit reports were shared by DFAIT with the RCMP and CSIS.

418. At a minimum, the RCMP received from DFAIT a copy of the report from the consular visits on October 23, 2002, April 22, 2003 and August 14, 2004. They also received a number of Ambassador Pillarella’s reports of his meetings with various Syrian officials, including General Khalil. In addition, there is evidence to suggest that the RCMP received a copy of Ms Girvan’s report of her visit with Mr. Arar at the MDC in New York. In a memorandum dated September 8, 2003, Don Saunders of ISI wrote the following, in response to a complaint from the RCMP that they did not know about the October 3, 2002 consular visit:

As for Loeppky’s assertion that the RCMP only learned about this consular visit some two weeks ago, the facts strongly indicate otherwise. We shared most of the information we had on this case with our RCMP Liaison Officer who passed it on to his headquarters.

Transcript of Proceedings, May 24, 2005, p. 3465 -3467
Exhibit P-93
Exhibit P-94
Exhibit P-95
Exhibit P-42, tab 547

419. CSIS, on the other hand, received from DFAIT a copy of the reports of the consular visits of January 7, 2003 and April 22, 2003.

Transcript of Proceedings, May 24, 2005, p. 3469 - 3470

420. Mr. Pardy testified that he gave approval to Mr. Solomon to share certain consular reports with the RCMP and CSIS. Gar Pardy initially testified he shared these reports with the RCMP and CSIS pursuant to the consent given by Mr. Arar and for the consistent purpose of assisting Mr. Arar:

Mr. Arar, in our view, gave us permission to disseminate information to people that would help him in the situation that he was in. That permission was given to Ms Girvan on October the 3rd in her meeting with him.

Second, the Privacy Act gives general permission which says that the information that is collected can be used for the purposes for which it was collected. We were collecting information to help Mr. Arar and it was, in my view, that that information could be passed on to individuals that could assist Mr. Arar, then it was appropriate to do so.

Mr. Pardy testified that he assessed the potential injury to Mr. Arar and the potential benefit to Mr. Arar from sharing the information with the RCMP and CSIS and concluded that it was appropriate to share the reports. Mr. Pardy further explained that he was trying to obtain cooperation from the RCMP and CSIS and he felt that sharing information might encourage their cooperation. Mr. Pardy repeatedly said that, in his view, providing the consular reports to the RCMP would help Mr. Arar.

Testimony of Gar Pardy, Transcript of Proceedings, May 24, 2005, pp. 3471 - 3476

421. During cross-examination, Mr. Pardy explained that the RCMP had expressed an interest in travelling to Syria to interview Mr. Arar. Mr. Pardy was of the view that, given the problems created by the CSIS visit, he would do anything to avoid a visit by the RCMP. To

this end, he decided to send some of the consular information to the RCMP in an attempt to “soften a heart or two” within the RCMP and keep them “out of the equation in Syria.” In other words, Mr. Pardy decided it was better to provide consular information to the RCMP that it would be for them to travel to Syria to collect information themselves.

Testimony of Gar Pardy, Transcript of Proceedings, June 2, 2005, pp. 5088 - 5096

422. Ms Girvan met with Mr. Arar on October 3, 2002. During that meeting, she obtained Mr. Arar’s consent to discuss his case with “his brother, mother-in-law and wife - anyone who could help him, including his company Mathworks.” Ms Girvan testified that she was shocked to find out that the RCMP had read the report of her meeting with Mr. Arar on October 3, 2003. She testified that she did not think the RCMP had access to her file. Ms Girvan also testified that she never discussed with Mr. Arar the possibility that information from her file about his case might be shared with policing or intelligence entities. On the basis of Ms Girvan’s testimony, it is simply not reasonable to say that Mr. Arar consented to the disclosure of consular reports, which are confidential, to the RCMP and CSIS. In any event, it was not informed consent as defined in the *Manual of Consular Instructions*.

Testimony of Maureen Girvan, Transcript of Proceedings, May 16, 2005, pp. 2374 - 2377

Exhibit P-42, tab 30
Exhibit P-11, tab 22, p. 6

423. Leo Martel also expressed surprise and disbelief when told that his consular reports were shared with the RCMP and CSIS.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, p. 11431

424. On the basis of the public record, the Commissioner ought to find that:

- (a) Mr. Arar did not consent to the sharing of the consular reports with the RCMP and/or CSIS.
- (b) The Department of Foreign Affairs had no authority to share the confidential consular reports with the RCMP or CSIS.
- (c) It was wrong for the RCMP or CSIS to put Mr. Pardy in a situation where he reasonably felt that a breach of confidentiality was required to protect Mr. Arar from the effects of the proposed visit to Syria.

C. THE ROLE OF THE RCMP

425. There is very limited evidence in the public domain about the role of the RCMP after Mr. Arar was detained in Syria. The Government of Canada has claimed national security confidentiality over almost every aspect of the RCMP's involvement in this case. All of the evidence about the RCMP involvement in this matter has been heard *in camera*. Counsel for Mr. Arar were not permitted to participate in the *in camera* process and, therefore, are not privy to the full evidentiary record. Nonetheless, the publicly available evidence raises a number of issues of significant concern in terms of the conduct of the RCMP.

- (i) **Was the RCMP's offer to share information with Syrian authorities inappropriate and made without due regard to the Syrian human rights record?**

426. The public evidence suggests that no information was give either directly by the RCMP or indirectly through DFAIT to the Syrian Military Intelligence about Mr. Arar. The

government claimed National Security Confidentiality over any information about whether information about Mr. El Maati or Mr. Almalki was shared with the Syrian Military Intelligence.

Testimony of James Gould, Transcript of Proceedings, August 24, 2005, p. 10397
Testimony of Inspector Cabana, Transcript of Proceedings, June 29, 2005, p. 8012
- 8013

427. Nonetheless, there is evidence that the RCMP either considered giving or did give information to the Syrians before Mr. Arar's detention. It is also perfectly clear that the RCMP was prepared to share information about Mr. Arar with the Syrian Military Intelligence while he was detained in Syria. There is also evidence that the RCMP received information from the Syrian authorities about Mr. Arar and about other cases in the past. In light of the public evidence, the Commissioner must make findings of fact about the whether there was information shared between the RCMP and the Syrian authorities. The Commissioner must also make findings of fact about whether the willingness to share information with regimes that torture their detainees during interrogations is ever appropriate and, if so, whether it was appropriate in the circumstances of this case.

a) Summary of the Public Evidence

428. Inspector Cabana testified that in July 2002, he had a conversation with the Criminal Operations Officer of "A" Division, Inspector Couture, about the prospect of sharing information with the Syrian authorities to further to AOCANADA investigation.

Testimony of Cabana, Transcript of Proceedings, June 29, 2005, p. 7867

429. Further, on July 16, 2002, Inspector Cabana met with Inspector Covey, the RCMP Liaison Officer accredited to the Canadian Embassies to Syria and Egypt. At the meeting, they discussed efforts made by Inspector Covey to gain access to an individual being detained abroad.¹ They also discussed the protocol for sharing of information gathered by Project AOCANADA with the Syrians. Following this meeting, Inspector Cabana spoke to Superintendent Watson, the Assistant Criminal Operations Officer at A Division, about the meeting with Inspector Covey. Superintendent Watson told Inspector Cabana that he thought it would be appropriate to share information with the Syrians.

Notes of Inspector Cabana, Exhibit P-166, pp. 40 - 41
Organizational Chart, Exhibit P-85, Vol. 1, tab 14

430. On September 10, 2002, Cabana went to a meeting at DFAIT with Superintendent Couture. Ambassador Pillarella was in attendance. During the meeting, Ambassador Pillarella was briefed on the AOCANADA investigation and the RCMP interest in a certain individual or certain individuals [the names have been redacted on the basis of National Security Confidentiality]. Ambassador Pillarella agreed to facilitate any future request to the Syrian government. During the meeting Ambassador Pillarella indicated that the Syrian authorities would likely expect the RCMP to share information with them. Inspector Cabana indicated that the RCMP intended to share relevant information from the Project AOCANADA investigation with the Syrian authorities and that packages had already been prepared to that end.

¹ Although it is unknown which Canadian they were trying to see, it is clear that Mr. Abdullah Almalki was in custody in Syria at this time. Mr. El Maati was transferred from Syria to Egypt at the end of January 2002 and was in custody in Egypt in July 2002; see Exhibit P-192

Notes of Inspector Cabana, Exhibit P-166, pp. 44 - 44A

Testimony of Inspector Cabana, Transcript of Proceedings, June 29, 2005, p. 7871 - 7873

431. On October 9, 2002, Mr. Arar arrived in Syria. Thereafter he was arbitrarily detained in Syria without charge. On October 21, 2002, the day the Syrian authorities confirmed that they had Mr. Arar in detention, Inspector Cabana received a call from James Gould of ISI. Mr. Gould first told Inspector Cabana of the news from Syria. In terms of sharing information with the Syrian authorities, Inspector Cabana indicated that the RCMP was prepared to share intelligence and evidence with the Syrian authorities if they felt it would be of assistance in their investigation. This offer was made in relation to two Canadians detained in Syria: Mr. Almalki and Mr. Arar. Inspector Cabana explained that he made this offer because the Syrians had shared information with the RCMP in the past. When asked what information had been provided by the Syrians in the past, the Government of Canada claimed national security confidentiality over the response.

Notes of Inspector Cabana, Exhibit P-166, pp. 54 - 55

Testimony of Inspector Cabana, Transcript of Proceedings, June 29, 2005, pp. 8005 - 8009

432. Inspector Cabana testified that he was not aware of the Human Rights record of Syria when this offer was made. He said he relied on the expertise of others, including Ambassador Pillarella, in terms of assessing Syria's Human Rights Record. Unfortunately, Ambassador Pillarella was equally unaware of the Human Rights record of Syria despite the vast body of publicly available information that suggests that the Syrian Military Intelligence engages in torture during its interrogations of detainees. Nonetheless, Inspector Cabana testified that he did not think it was inappropriate for the RCMP to offer to share information with the Syrian Military Intelligence. He explained that his mandate was to prevent further attacks and if sharing information with the Syrian Military Intelligence would further his mandate, he would not object.

Testimony of Inspector Cabana, Transcript of Proceedings, June 29, 2005, p. 8009

- 8013

433. According to Mr. Leo Martel, the Syrian Military Intelligence spread terror among the citizens of Syria. The Syrian Military Intelligence has a reputation for arbitrarily detaining people and torturing detainees as part of the interrogation process. This reputation is confirmed by a vast body of public information about Syria's mistreatment of its detainees. According to the *2002 Amnesty International Report on Syria*, "torture and ill-treatment continued to be inflicted routinely on political prisoners, especially during incommunicado detention at the Palestine Branch and Military Interrogation Branch detention centres." Similarly, the United States Department of State 2002 Country Report on Human Rights Practices in Syria contains the following observations:

The Government's human rights record remained poor, and it continued to commit serious abuses. Citizens did not have the right to challenge their government. The Government used its powers to prevent any organized political opposition, and there have been very few antigovernment manifestations. Continuing serious abuses included the use of torture in detention; poor prison conditions; arbitrary arrest and detention; prolonged detention without trial; fundamentally unfair trials in the security courts; an inefficient judiciary that suffered from corruption and, at times, political influence; and infringement on privacy rights.

This report goes on to state that there is "credible evidence that security forces continued to use torture." These same observations are found in the 2003 Country Report on Human Rights Practices in Syria. In its 2003 Annual Report, the Syrian Human Rights Committee makes the following comments about the treatment of detainees in Syria:

Due to the absence of the rule of law and its replacement with a martial law and a rising number of security elements, Syrian citizens have been subject to the horrifying prospect of being detained at any time and from any location. This prospect is by no means limited to those who live in Syria, whether citizens or residents, but also befalls tourists and visitors, Syrian or otherwise. Indeed, this year was littered with huge numbers of people who were harassed and detainees who were treated badly both on physical and psychological fronts.

This same report describes how Mr. Arar had been “subject to severe torture and intensive interrogation and charged with cooperating with Al-Qaeda.” In addition, DFAIT and the RCMP had direct knowledge of the use of torture by Syrian Military Intelligence. On August 12, 2002, Mr. El Maati reported in great detail to the Consul in Cairo that he had been tortured while in custody in Syria. On August 15, members of Project AOCANADA met to discuss “media lines to be used when Ahmad El Maati’s allegations about torture” arise.

Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, p. 11477 - 11478

2002 Amnesty International Report on Syria, Exhibit P-29

Department of State 2002 Country Report on Human Rights Practices in Syria, Exhibit P-27

Department of State 2003 Country Report on Human Rights Practices in Syria, Exhibit P-28

Syrian Human Rights Committee 2003 Annual Report, Exhibit P-42, tab 478

Syrian Human Rights Committee Letter to Dr. Mazigh, Exhibit P-42, tab 573.11 Exhibit P-192

Exhibit P-83, tab 1, p. 182

434. According to Professor Burns, sharing information about an arbitrarily detained Canadian citizen with a regime that engages in torture for the purpose of assisting their investigation could violate the Canadian Government’s obligations under the *Convention Against Torture*. Although Syria has now ratified the *Convention Against Torture*, it did so in 2004 and was not a signatory in 2002 or 2003 when Mr. Arar was detained by the Syrian Military Intelligence. Furthermore, Syria has opted out of, or has failed to opt into, the complaint mechanisms under *C.A.T.* However, Canada is bound by *C.A.T.*

Testimony of Peter Burns, Transcript of Proceedings, June 8, 2005, pp. 5942 - 5943

b) Analysis

435. Based on the above summary of the evidence in the public record, the Commissioner ought to make the following findings of fact:

- (i) The RCMP was prepared to share information about Maher Arar gathered during the AOCANADA investigation with the Syria Military Intelligence;
- (ii) The express purpose of such information sharing was to assist the Syrian Military Intelligence in their investigation of Maher Arar;
- (iii) The RCMP knew, or ought to have known based on publicly available credible information, that the Syrian Military Intelligence uses torture during its interrogations of detainees;
- (iv) The RCMP did not give sufficient weight to the existing body of evidence regarding Human Rights violations in Syria when considering whether to offer to share information about Maher Arar, or any other detained Canadian, with the Syrian Military Intelligence;
- (iv) The RCMP knew, or ought to have known, that providing information about Maher Arar to the Syrian Military Intelligence could have encourage them to continue their interrogations of Maher Arar and to continue using torture during their interrogation.

436. The Commissioner ought to make a recommendation that the RCMP not share information about arbitrarily detained Canadians with regimes that engage in torture or likely engage in torture as defined by the *Convention Against Torture*, regardless of whether there is a written Memorandum of Understanding as required by RCMP Policy.

Exhibit 12, tab 26, p. 7

(ii) Did the RCMP improperly impede the efforts of Foreign Affairs to secure Mr. Arar's release by refusing to cooperate in the signing of a letter?

437. On October 31, 2002, Michael Edelson, counsel for Mr. Arar, at the suggestion of Mr. Gar Pardy, sent a letter to Ann Alder at the Department of Justice requesting a letter from the RCMP confirming that: (1) the RCMP did not ask that Mr. Arar be deported to Syria; (2) Mr. Arar did not have a criminal record; (3) Mr. Arar was not wanted in Canada for any offence; and (4) Mr. Arar was not suspect in any terrorist related crime. Mr. Edelson made it clear in his letter that Mr. Pardy was confident that a letter from the RCMP to would be a crucial to the Departments efforts to secure the release of Mr. Arar.

Exhibit P-83, tab 1, pp. 228 - 229

Testimony of Gar Pardy, Transcript of Proceedings, May 25, 2005, p. 3531 - 3535

438. This was the beginning of eight months of negotiations between DFAIT and the RCMP to secure a letter, in various forms, confirming Mr. Arar's status in Canada. Throughout these negotiations, the RCMP resisted any letter that would have been truly helpful and ultimately proposed language for the letter that was counter-productive to DFAIT efforts to have Mr. Arar released from Syrian custody.

439. The RCMP initially took the position that Mr. Edelson's request itself was inappropriate. Inspector Cabana explained his response to the request:

First of all it was -- and this is my personal view -- it was highly inappropriate for a request like this, for DFAIT to suggest that a request like this to be

challenged through counsel to the RCMP.

First of all, the request should have been made by DFAIT to the RCMP, not through counsel.

Secondly, as a matter of policy, the RCMP is not in the habit or even in a position to be able to confirm the majority of these points here.

Inspector Cabana also took the position that DFAIT did not understand the “possible impact of these types of discussions can have on an ongoing investigation.” This response suggests that Inspector Cabana felt that a letter from the RCMP, of the kind suggested by Mr. Edelson, would impair their relationship with the Syrian Military Intelligence and thereby negatively effect the investigation into Mr. Arar and others. Ultimately, Inspector Cabana provided Mr. Edelson with a letter that simply confirmed that Mr. Arar did not have a criminal record in Canada. Mr. Edelson testified that both he and Mr. Pardy were totally frustrated by the response he received. The letter did not address any of the issues raised in his request.

*Testimony of Inspector Cabana, Transcript of Proceedings, June 29, 2005, pp. 8018
- 8021
Exhibit P-83, tab 1, p. 230
Exhibit P-83, tab 1, p. 233; Exhibit P-150
Testimony of Michael Edelson, Transcript of Proceedings, June 16, 2005, pp. 7329
and 7443*

440. Mr. Pardy testified that, short of being a uniform member of the RCMP, he knew more about RCMP operations and procedures than anyone else in DFAIT. He thought Mr. Edelson’s request was reasonable. Nonetheless, after receiving the RCMP response, Gar Pardy took over efforts to secure a letter from the RCMP. These efforts continued until Prime Minister Chrétien intervened in June, 2003 and ultimately sent a letter to Syrian President Bashar Al Assad.

Testimony of Gar Pardy, Transcript of Proceedings, May 25, 2005, p. 3543 - 3546

441. On May 5, 2003, Gar Pardy circulated to the RCMP a draft action memo to the Minister of Foreign Affairs recommending that a joint statement be issued from the Minister of Foreign Affairs and the Solicitor General to the effect that there is no evidence in Canada that Mr. Arar is a member of Al-Qaeda and that Mr. Arar should be permitted to return to Canada. An inter-agency meeting was held on May 12, 2003 to discuss this proposal. According to Mr. Pardy, no consensus was reached at that meeting about a joint letter being signed. Eventually, Mr. Pardy drafted a memorandum recommending that a letter be sent just from the Minister of Foreign Affairs. This initiative was ultimately overtaken by Mr. Pardy's simultaneous efforts to have the Prime Minister send a letter to the President of Syria. Mr. Pardy described this as an "effort to forge a consensus at the top of the Canadian government." Mr. Fry, Senior Policy Advisor to the Minister of Foreign Affairs, testified that they decided to pursue a letter from the Prime Minister because they had "run into a bit of an obstruction" in terms of agreement on a letter from the Minister of Foreign Affairs.

Exhibit P-117, vol. 2, tab 75.3

Exhibit P-19, p. 40

*Testimony of Gar Pardy, Transcript of Proceedings, May 25, 2005, p. 3698 - 3701;
3708 - 3714; 3723*

Testimony of Robert Fry, Transcript of Proceedings, June 13, 2005, p. 6500 - 6501

442. Throughout the negotiations over the letter, the RCMP took the position that a joint letter was inappropriate. The RCMP also opposed the language proposed by DFAIT for a letter to be signed by the Minister of Foreign Affairs only. According to a memo drafted by Mr. Gar Pardy, both CSIS and the RCMP made it clear that they "will not provide any direct

support in having Mr. Arar return to Canada.”

Exhibit P-117, Vol. 2, tab 75.5

443. DFAIT sought approval from various parts of government to send a letter stating that “the Government of Canada has no evidence Mr. Arar was involved in any terrorist activity.”

After much discussion, both the RCMP and CSIS recommended the following language instead:

Mr. Arar is currently the subject of a National Security Investigation in Canada. Although there is not sufficient evidence at this time to warrant Criminal Code charges, he remains a subject of interest. There is no Canadian government impediment to Mr. Arar’s return to Canada.

Mr. Pardy testified that this language would not have been helpful to the efforts being made by DFAIT to have Mr. Arar released from Syrian custody and was “clearly unacceptable.”

Mr. Gary Loeppky, Deputy Commissioner of the RCMP, agreed that this language would be counterproductive in terms of having Mr. Arar return to Canada.

Exhibit P-117, Vol. 2, tab 75.9

Exhibit P-117, Vol. 2, tab 75.8

Testimony of Gar Pardy, Transcript of Proceedings, May 25, 2005, pp. 3699 - 3701; 3714

Testimony of Gary Loeppky, Transcript of Proceedings, July 27, 2005, pp. 8575 - 8576

444. In the midst of the negotiations about the language of the letter, a Briefing Note was sent to the Commissioner outlining concerns about the RCMP supporting efforts to secure Mr. Arar’s release. The Briefing Note states as follows:

The potential for embarrassment exists should the Prime Minister become involved in a similar fashion to the incident following the Egyptian Embassy bombing in 1995 in Pakistan. In that situation, the Prime Minister intervened on behalf of Ahmed Said KHADR, an Egyptian-Canadian, who was

subsequently released from Pakistani custody.

KHADR is now recognized internationally as a high-ranking Al-Qaeda member and wanted by the Egyptians for the bombing. The intervention of the PM has been raised on a number of occasions in an attempt to embarrass the government.

In a handwritten note on the briefing, Deputy Commissioner Loepky suggested a briefing to ensure that Canada is not "put in an embarrassing position of having the highest level of political lobby only to find out, as happened with KHADR, that [Mr. Arar] is clearly involved in terrorist activity."

Exhibit P-117, Vol. 1, tab 49

a) Analysis

445. On the basis of the above factual record, it is submitted that the Commissioner ought to make the following findings of fact in respect of the conduct of the RCMP:

- (a) The request by Michael Edelson for a letter from the RCMP on October 31, 2003 was appropriate and reasonable in the circumstances.
- (b) The reason given by Inspector Cabana for declining the request, namely that the request ought to have come through DFAIT, was specious. Any potential breach of protocol could easily have been rectified with a meeting or telephone call between Inspector Cabana and Mr. Pardy. Inspector Cabana made no effort to contact Mr. Pardy.
- (c) There was some other institutional impediment to providing a letter to Mr. Edelson or DFAIT to be used to strengthen a request to have Mr. Arar released.

- (d) The RCMP was unwilling to work with DFAIT to find a fair and accurate way to portray Mr. Arar's peripheral connection to the Project AOCANADA investigation that would, at the same time, assist in efforts to have him released from custody;
 - (e) The RCMP opposed efforts to have the Minister of Foreign Affairs send a letter seeking Mr. Arar's release;
 - (f) The RCMP was unwilling to provide any direct support to DFAIT for their efforts to have Mr. Arar released from Syrian custody;
 - (g) The RCMP knew or ought to have known that the language proposed by them for a letter to the Syrian officials was counter-productive to the efforts being made by DFAIT to secure Mr. Arar's release.
 - (h) The RCMP intentionally made reference to the Khadr case to discourage, the Commissioner of the RCMP, the Solicitor General and the Minister of Foreign Affairs from taking any steps to assist Mr. Arar.
 - (i) The RCMP did not want Mr. Arar to be released from custody in Syria.
 - (j) The actions of the RCMP prolonged Mr. Arar's detention which, given the conditions of his detention, constitutes torture.
- (iii) Did the RCMP fail to provide sufficient information to DFAIT to allow them to carry out their consular duties? Is there a duty on the RCMP to provide DFAIT with information that would assist in the defence of a Canadian detained abroad?**

446. Deputy Commissioner Loepky testified that the RCMP shares information with DFAIT if it is necessary for them to carry out their mandate of providing consular assistance. Mr. Loepky also testified that operational information could be shared with DFAIT if it is relevant to their mandate. In response to a hypothetical question, Mr. Loepky agreed that the RCMP would share with DFAIT a statement attributed to Mr. Arar if it was considered relevant to carrying out their mandate. Mr. Loepky also testified that the RCMP would share with DFAIT information that might show a Canadian detained abroad is innocent. In fact, Mr. Loepky stated that whatever information is necessary to assist DFAIT in fulfilling its mandate to bring Canadians home would be shared.

Testimony of Gary Loepky, Transcript of Proceedings, July 27, 2005, p. 8503 - 8508

447. Mr. Pardy and Mr. Martel both confirmed that the mandate of consular affairs includes assisting a detained Canadian in preparing for trial and ensuring a detained Canadian receives a fair trial. Mr. Pardy explained that this extended to providing information to counsel that would assist in the defence of a detained Canadian:

MS EDWARDH: But surely, sir, if you had any information that would assist in Mr. Arar's defence, once you have a sense of what the allegations [were], you're going to get it into the hands of someone who can ensure that counsel in Syria can try to defend Mr. Arar?

MR. PARDY: And we would have given it directly to the counsel through the embassy, yes.

This part of the consular affairs mandate was particularly important in this case because Leo Martel was told by General Khalil on August 14, 2003 that Mr. Arar would be taken to court within one week and that, during the trial, Mr. Arar could "object to any part of the interrogation transcript."

Testimony of Gar Pardy, Transcript of Proceedings, May 26, 2005, pp. 3961 - 3965
Testimony of Leo Martel, Transcript of Proceedings, August 31, 2005, pp. 11327 - 11328
Exhibit P-134, tab 24, p. 3

448. The RCMP refused to share any information about their investigation with DFAIT. In fact, Mr. Pardy testified that the RCMP did not, as a matter of policy, share information that related to their investigation of Mr. Arar with anyone outside of the force. He further testified that DFAIT was not given details of the investigation, even if they might have been useful to Mr. Arar's defence. Although DFAIT clearly had the document provided by Syrian Military Intelligence to Ambassador Pillarella on November 3, 2005, they did not have details of the RCMP investigation that might have assisted in the release of Mr. Arar.

Testimony of Gar Pardy, Transcript of Proceedings, June 2, 2005, pp. 4962, 4988
Exhibit P-83, tab 2, p. 203

a) Analysis

449. Despite the testimony of Deputy Commission Loeppky, it is clear that the RCMP did not share information with DFAIT that was relevant to their mandate to provide consular services. It is also clear that no inter-agency mechanism was in place to determine what information may be of assistance to a Canadian detained abroad and what information may be used by the defence in a foreign trial. If the RCMP had any information about the statements Mr. Arar is alleged to have made while in Syrian custody, including the statements themselves, that information should have been disclosed to DFAIT. Similarly, if the RCMP had information or evidence that could have been used to challenge the voluntariness or accuracy of statements made by Mr. Arar during his interrogation in Syria,

that information should have been disclosed to DFAIT so it could be passed on to Mr. Arar's defence counsel.

450. Based on the above submissions and summary of evidence, the Commissioner ought to make the following findings of fact:

- (a) The RCMP refused to share relevant information with DFAIT about their investigation of Mr. Arar;
- (b) The RCMP did not understand, appreciate or respect the mandate of the Consular Services Branch of DFAIT in that they did not understand, appreciate or respect that DFAIT has an obligation to assist Canadians detained abroad and ensure they have a fair trial;
- (c) Contrary to Deputy Commissioner Loeppky's evidence, the RCMP failed, in this case, to share with DFAIT all information in its possession that was relevant to the mandate of the Consular Affairs Division.

(iv) Should the RCMP have received and/or acted upon the summary of the statement given by Mr. Arar while in custody in Syria?

451. Very little is known about how much information the RCMP received from the Syrian Military Intelligence as a result of their interrogation and torture of Mr. Arar. It is clear that the RCMP received a three-paragraph document (*bout de papier*) that was provided to Ambassador Pillarella and translated by CSIS. The Information to Obtain a search warrant to be executed at the residence of Juliet O'Neill, and the article she wrote for publication in the *Ottawa Citizen*, suggest that more detailed information from the interrogation was

provided to the RCMP. Beyond this, the Government of Canada has claimed national security confidentiality over any other information or documents received from Syria. In an objection to a question posed to Mr. Livermore, Ms McIsaac explained the scope of the Government of Canada's claim of national security confidentiality:

It has been acknowledged that that information was brought back about Mr. Arar by the Ambassador. The Government has not provided any further information and claims National Security Confidentiality with respect to any other information received from the Syrian government by anyone, including CSIS, with respect to this or related matters.

Transcript of Proceedings, August 24, 2005, pp. 10252 - 10259
Affidavit of Corporal Quirion, Exhibit P-187

452. It is, however, clear that the RCMP *wanted* more information from the Syrian Military Intelligence about their interrogations of Mr. Arar. Inspector Cabana testified that the information contained in the *bout de papier* was not specific and could not be verified. Inspector Cabana was also concerned because the information received from Syria was not in an admissible format. Inspector Cabana was of the view that there must be a more detailed statement available. Inspector Cabana was also of the view that more information was required from the Syrians. In fact, Inspector Cabana testified that this view was also held by members of CSIS who attended an inter-agency meeting on November 6, 2002:

The discussions that took place, like I said earlier, were focused on the -- I should say the lack of detail in the information that reached us. And as investigators, everyone was in agreement that this was basically a recount or synopsis of a detailed interview that had taken place, and in order for us to be able to conduct a proper analysis to try to assess -- again, we are not focusing on Mr. Arar, we are focusing on the threat to Canada.

To be able to assess the validity of the information and to see if there was any more information that would help us focus on this threat, more information was requested.

Whether more detailed information or admissible evidence was requested or obtained, either by Ambassador Pillarella or CSIS, is unknown to the public because of the Government of Canada's claims of national security confidentiality.

Transcript of Proceedings, June 29, 2005, pp. 8030 - 8033

Transcript of Proceedings, June 30, 2005, p. 8109

453. What is shocking about the November 6, 2002 inter-agency meeting is that the evidence is unclear whether there was any discussion at all about the possibility that the statement received was the product of torture. Inspector Cabana testified that there was no discussion whatsoever about the possibility that the statement obtained from the Syrians was the product of torture or about the reliability of the statement in light of the interrogation techniques employed by the Syrian Military Intelligence. Ambassador Pillarella, on the other hand, testified that there was a general discussion at the meeting that the statement ought to be viewed with a certain amount of skepticism because they did not know whether Mr. Arar, "finding himself in the situation where he was, thought it might be better to cooperate and let the Syrians hear what they wanted to hear so that...he would be safe."

Testimony of Inspector Cabana, Transcript of Proceedings, June 29, 2005, pp. 8034 - 8035

Testimony of Franco Pillarella, Transcript of Proceedings, June 14, 2005, pp. 6856 - 6859

454. There is evidence to suggest that CSIS received a copy of another document that was provided to Tracy Reynolds by General Khalil when Mr. Arar was released from Syrian custody on October 5, 2003. General Khalil also indicated that other documents relating to Mr. Arar would be provided to the Embassy in November. Minister Graham made this information available to the media on October 7, 2003. In answer to a question about what the Minister was going to do to clear Mr. Arar's name because of the cloud of suspicion hanging over him, he is reported as saying:

Well, Mr. Arar will be looking at what legal recourse he has to deal with clearing his name. And the authorities will have an opportunity to look at the file, which will be transferred from Syria to know whether there are any

problems with Mr. Arar. That's a police matter, as the Solicitor General has said. He is not going to comment on it, and neither am I going to comment on it.

Testimony of Leo Martel, Transcript of Proceedings, August 30, 2005, pp. 11189 - 11190
Exhibit P-42, Vol. 7, tab 605

455. A translation of the document received from General Khalil was sent to ISI and ISD on October 13, 2003. The original document was received by DFAIT on October 24, 2003. On October 27, 2003, Mr. Heatherington sent a copy of the translation, which is described as a "summary of the information gained from Mr. Arar during the course of his detention, to Glenn Robinson in the Privy Council Office, Dan Killam of the RCMP and one other person. The identity of the third recipient of the translation has been redacted, presumably on the basis of national security confidentiality. It is a reasonable inference, however, given the nature of the document, that the third recipient was someone at CSIS.

Testimony of Leo Martel, Transcript of Proceedings, August 30, 2005, pp. 11189 - 11190
Exhibit P-42, tab 614
Exhibit P-42, tab 622

456. It is also clear that efforts were made to obtain more information from the Syrian Military Intelligence after Mr. Arar was released from custody. On October 29, 2003, Mr. Gould sent an e-mail message to the RCMP liaison officer to DFAIT and another undisclosed person asking whether they had received any further information from the Syrians as General Khalil had promised:

As you are aware, when the Syrians released Arar, they promised to provide us (Canada) with a more complete file (IE the information they obtained as a result of their investigation into their activities). Have you received a copy of this file through your security liaison or police files? Can the file be made

available to us on a very urgent basis?

Also on October 29, 2003, Mr. Gould sent a memorandum to Jim Wright confirming that although no further information had been received from Syria, "enquiries have been made of the Embassy, CSIS, the RCMP, as well as the geographic and consular divisions of the Department." In light of the nature of the inquiry and in light of Mr. Gould's memo, it is a reasonable inference that his e-mail message of October 29, 2003 was also sent to the CSIS liaison officer to DFAIT or someone else within CSIS.

Exhibit P-42, tab 626

Exhibit P-42, tab 627

457. Amazingly, these further inquiries were made after the Department of Foreign Affairs had confirmation that Mr. Arar was tortured while in Syria. These inquiries were made after Mr. Arar confirmed that he was held incommunicado for two weeks in Syria. This was also after Mr. Arar told Mr. Martel on August 14, 2003 that he was held in a cell that was 3 feet wide by 7 feet long by 6 feet tall and that he was sleeping on the floor. It was also after Mr. Martel was told, either on August 14, 2003 or on October 6, 2003, that Mr. Arar was beaten by members of the Syrian Military Intelligence during the intensive interrogation at the beginning of his detention. It was also after Mr. Martel reported this to a number of senior officials within DFAIT including Mr. Peter McRea, Mr. John McNee, Mr. Mark Bailey, Mr. David Dyet, and Mr. Robert Fry. There does not appear to have been any discussion about the propriety of requesting more information from the Syrian Military Intelligence, or the value of any information received, in light of the fact that Mr. Arar was tortured while in custody.

Exhibit P-242, tab 1

Exhibit P-42, tab 131

Exhibit P-42, tab 508

Testimony of Leo Martel, Transcript of Proceedings, August 30, 2005, pp. 11156 - 11161

D. THE ROLE OF CSIS

(i) National Security Confidentiality Claims and the Scope of Disclosure

458. Very little information is on the public record about the role CSIS played in Mr. Arar's case. In particular, little is known about what efforts were made by CSIS to either secure or prevent Mr. Arar's release. The Government of Canada claimed national security confidentiality over almost all aspects of their involvement. For example, on August 24, 2005, during the testimony of James Gould, Ms Mclsaac made the following statement on behalf of the government of Canada:

My instructions are that we are refusing to confirm or deny whether or not any information traveled from CSIS to the Syrian authorities.

Similarly, during the testimony of Inspector Cabana on June 30, 2003, Mr. Fothergill explained the limits of what information the Government of Canada was prepared to disclose about the actions of CSIS employees:

Let me just reiterate, there is a claim of national security confidentiality with respect to CSIS' involvement in this matter beyond what appears in your summary and the very isolated details of the Syria trip..

Later that same day Mr. Fothergill repeated the Government's position:

I say again, we are objecting to particulars of CSIS' involvement in this investigation if it goes beyond what is in the summary that has been published by the Commission and the three facts about the trip, which is that it was not principally related to Mr. Arar and that Mr. Arar was not interviewed when CSIS went to Syria, although he may have been discussed. Beyond that, there is a claim of NSC.

Transcript of Proceedings, June 29, 2005, p. 10259

Transcript of Proceedings, August 24, 2005, p. 10397

(ii) CSIS Visit to Syria

459. In addition to the admissions made by counsel for the Government of Canada about the CSIS trip to Syria, it is clear that the delegation from CSIS traveled to Syria on November 19, 2002. It is also clear that there was no consensus about the propriety of the CSIS visit to Syria or the propriety of the timing of the CSIS visit to Syria. The decision to send CSIS officials to Syria was made on November 6, 2002. However, at an inter-departmental meeting on November 18, 2002, senior officials within DFAIT asked CSIS to delay their trip to Syria. CSIS refused to delay the trip but did agree not to attempt to interview Maher Arar during their trip.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10625 - 10626
Exhibit P-134, tab 8
Exhibit P-134, tab 7

460. Mr. Livermore's testimony suggested that the CSIS visit to Syria in November 2002 was for the purpose of establishing a relationship with Syrian Military Intelligence. In response to a question about whether the Syrian Military Intelligence would have been more attentive to a letter from CSIS rather than the Minister of Foreign Affairs, Mr. Livermore stated as follows:

I would accept your argument if CSIS had had a mature relationship of several Years' standing, which possibly had been cemented over the years with visits back and forth between the head of the Syrian organization and the head of CSIS, establishing a dialogue and the basis of relationship. But, in fact, they had none. The basis of their relationship was basically one visit to establish the relationship.

Testimony of Daniel Livermore, Transcript of Proceedings, August 24, 2005, p. 10319 - 1320

461. According to Jack Hooper, Assistant Deputy Director of Operations for CSIS, the purpose of the visit was to “receive information from the Syrian side that may have relevance to threats to the security of Canada that [CSIS was] mandated to investigate.”² Mr. Hooper confirmed that Mr. Arar was discussed during the CSIS trip to Syria. He also testified that they went to Syria to elicit information from the Syrian Military Intelligence and not to exchange information with them. Finally, Mr. Hooper confirmed that the CSIS delegation to Syria brought back information in relation to Mr. Arar.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10626, 10816, 10825 - 10826

See also:
Exhibit P-134, tab 8

462. The record also discloses that the CSIS agents that visited Syria did not report back to Ambassador Pillarella following their meeting with the Syrian Military Intelligence.

² As an aside, this trip, and the entire AOCANADA investigation may well have been precipitated by the discovery of a map of Tunney’s Pasture in the truck driven by Mr. El Maati, an Egyptian Muslim man, which was, in fact, issued by the Government of Canada to assist visitors in locating various buildings in this complex.

Exhibit P-134, tab 10

(iii) Information Sharing with Syrian Military Intelligence

463. Despite the Government's refusal to confirm or deny whether information was received by CSIS from the Syrian Military Intelligence, there is evidence to suggest that CSIS was the recipient of information from the Syrian Military Intelligence on two occasions.

464. CSIS clearly received the three-paragraph document provided to Ambassador Pillarella by the Syrians on November 3, 2002. In fact, CSIS was responsible for translating this document. However, according to Jack Hooper, the information provided, even if true, was not damning evidence against Mr. Arar and was not useful to CSIS. It did not assist CSIS with its threat assessment.

Exhibit P-134, tab 6

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10617 and 10629

465. A number of other documents suggest that CSIS obtained further information about Mr. Arar during their visit to Syria. For example, a document entitled "Chronology of Maher Arar Case - ISI Input", contains the following entry for December 16, 2002:

CSIS message to ISI providing translated transcript of Arar's statement during interrogation/interviews with Syrian Military Intelligence.

Subsequent drafts of the chronology and the final chronology dated November 13, 2003 contain the following entry for that same day:

In response to a request for a debriefing on the CSIS visit to Damascus, CSIS provides a report summarizing what appears to be information provided to Syrian Military Intelligence by Arar under interrogation.

This was confirmed by Mr. Hooper in his evidence before the Commission.

Exhibit 237, tabs 4, p. 2

Exhibit 237, tab 5, p. 7

Exhibit 237, tab 6, p. 5

Exhibit 237, tab 8, p. 12

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10826

466. This is also consistent with Mr. Edelson's testimony that during a meeting with the RCMP in November or December 2002, he was told that CSIS had traveled to Syria and had obtained some form of a statement given by Mr. Arar. At the time of the meeting, the RCMP expressed concern because they had not yet received a copy of the statement from CSIS.

Testimony of Michael Edelson, Transcript of Proceedings, June 16, 2005, p. 7344
Exhibit P-142

(c) Miscommunication with Syria and Efforts to Obtain a Letter

467. On January 15, 2003, Ambassador Pillarella sent a report to the head office of DFAIT regarding a meeting he had with the Syrian Vice-Minister of Foreign Affairs, Mr. Haddad. During their meeting, Minister Haddad reported that CSIS told someone within Syrian Military Intelligence that they did not want to see Mr. Arar return to Canada and that CSIS was "quite content with the way things were."

Exhibit P-134, tab 14

Testimony of Leo Martel, Transcript of Proceedings, August 29, 2005, pp. 11114 - 11115

468. Mr. Hooper testified that, once he became aware of these concerns, he met with the CSIS delegation that had been in Syria. Mr. Hooper testified that he satisfied himself that these comments were not made:

So I made inquiries, and determined that the Service gave nothing to the Syrian side that to my mind would logically lead to this conclusion and that was conveyed back to Foreign Affairs. We did not say those words to the Syrians.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10639

469. On January 16, 2003, Minister Graham spoke to the Syrian Foreign Minister, Mr. Shara'a, in an attempt to rectify any misunderstanding. Following this conversation, a representative of the Middle East Geographic Division called the Syrian Ambassador to Canada to advise him about the call. During this conversation, Ambassador Arnous confirmed that he too had heard that the "Syrian security service had been told by their Canadian counterparts that Canada did not wish to see Arar return to Canada." In the end, Ambassador Pillarella was instructed to convey to Vice Minister Haddad and General Khalil that "the return of Arar to Canada is the preferred option of the Government of Canada." It is quite clear that some senior Canadian officials believed that, as of January 16, 2003, any confusion that might have existed about whether CSIS wanted Mr. Arar returned to Canada had been cleared up. For example, Mr. Livermore testified that after the call between Minister Graham and Minister Shara'a, the confusion was over:

Mr. Graham spoke to the Syrian Foreign Minister, and that was the end of the confusion. There was no more confusion in the minds of the Syrians about Canadian intentions. I say Canadian because we are talking here about Foreign Affairs, CSIS the RCMP.

Mr. Hooper testified as follows:

...I would say in public testimony that quite independent of our learning these facts from the Department of Foreign Affairs we had information from an independent source that satisfied the service that notwithstanding what may have been said, by the time these calls were made, the discussions were held, there was no misunderstanding on the part of any Syrian entity as to what the position of the Government of Canada was relative to Mr.

Arar.

Exhibit P-134, tab 14

Exhibit P-134, tab 16

Testimony of Daniel Livermore, Transcript of Proceedings, August 24, 2005, p. 10269

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, p. 10645

470. Obviously, there is insufficient evidence on the public record to assess the validity of these claims that the statements were not made to the Syrian Military Intelligence and the misunderstanding on the part of the Syrians was categorically dispelled in mid-January. Nonetheless, despite efforts made to clear up any misunderstanding, the impression that CSIS did not want Mr. Arar to return to Canada persisted, at least within some parts of DFAIT, well into June of 2003 and continuous efforts were made by Mr. Pardy, and others, to ensure that Canada was speaking with one voice. For example, on March 21, 2003, Marlene Catterall and Sarkis Assadourian met with Ambassador Arnous in preparation for their visit to Syria. During that meeting, Ambassador Arnous explained that initially, CSIS officials told the Syrians that they have no interest in Mr. Arar. This comment was reported to Ms Pastyr-Lupul who then took the position that a clear message had to be sent to the Syrians, in writing, from CSIS. Then, on June 24, 2003, Mr. Gould drafted a memorandum which states, in part, as follows:

There is no sufficient evidence against Arar for him to be charged with anything in Canada. CSIS has made it clear to the Department that they would prefer to have him remain in Syria, rather than return to Canada.

Mr. Gould testified that this comment was his overall conclusion about the position of CSIS based on weeks and months of dealings with CSIS with respect to Maher Arar. In his memorandum, Mr. Gould recommended that the Solicitor General and the Minister of

Foreign Affairs “agree on a plan of action to deal with Mr. Arar.” Similarly, in a memorandum dated June 5, 2003, Mr. Gar Pardy stated that “Syrian officials informed us that they were informed by CSIS officials that Canada did not want to have Mr. Arar returned.”

Exhibit P-99

Exhibit P-237, tab 2

Testimony of James Gould, Transcript of Proceedings, August 24, 2005, p. 10421

Exhibit P-103, p. 4

471. The position taken by CSIS on the issuance of a joint letter suggests that CSIS was either indifferent to Mr. Arar’s continued detention in Syria or wanted Mr. Arar to remain in Syrian custody. It is clear from Mr. Pardy’s memorandum of June 5, 2003 that CSIS made a decision that it would not “provide any direct support in having Mr. Arar returned to Canada.” However, there is evidence to support the inference that CSIS actually wanted Mr. Arar to remain in Syria. For example, in a May 12, 2003 briefing to the Solicitor General, CSIS strongly recommended that the Solicitor General not sign a joint letter with the Minister of Foreign Affairs. Although large portions of this briefing memorandum have been redacted, it is clear that CSIS was concerned that the US government may “question Canada’s motives and resolve” in relation to the war against terrorism should the Solicitor General sign any letter intended for use in a campaign to release Mr. Arar. Mr. Hooper testified that the advice to the Solicitor General in regard to signing a letter was as follows:

To tell him that there was some political jeopardy to doing this. Leave it to your colleague, the Minister of Foreign Affairs. It’s his responsibility.

Exhibit P-117, vol. 2, tab 75.5

Exhibit P-117, vol. 2, tab 75.4

Testimony of Jack Hopper, Transcript of Proceedings, August 25, 2005, p. 10671

472. Mr. Hooper testified that CSIS did not object to Mr. Arar being returned to Canada, but did object to the language proposed by DFAIT for use in the letter. He also testified that it was the preference of CSIS that the letter be signed by the Minister of Foreign Affairs only:

...[O]ur position had always been a preference for the Minister of Foreign Affairs to send a letter and that the language of the letter be accurate.

In the end, CSIS recommended language for the letter that, according to Mr. Pardy and Mr. Loepky, was counter-productive to the efforts being made by DFAIT to have Mr. Arar returned to Canada. As outlined above, CSIS, in conjunction with the RCMP recommended the following language for the letter:

Mr. Arar is currently the subject of a National Security Investigation in Canada. Although there is not sufficient evidence at this time to warrant Criminal code charges, he remains a subject of interest. There is no Canadian government impediment to Mr. Arar's return to Canada.

Mr. Hooper was not prepared to "speculate" about whether this language would be helpful to DFAIT in its efforts to secure Mr. Arar's release.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10698 - 10699; 10711, 10718

473. Nonetheless, Mr. Hooper confirmed that CSIS had at least three concerns about Mr. Arar returning to Canada. First, if CSIS was to support efforts to have Mr. Arar return, the Americans may question Canada's commitment to fight terrorist which may, in turn, impact on capacity of CSIS to deal with US counterparts." Second, if Mr. Arar and other detained Canadian who were perceived to be a security threat were returned to Canada, it would put a strain on CSIS resources. Third, if Mr. Arar returned to Canada and alleged that he was tortured in Syria, that would make it difficult for CSIS to have individuals who they believe

pose a risk to Canada's security deported or removed to Syria.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10661, 10669 and 10677 - 10711

474. On the basis of this evidence, the Commissioner ought to make the following findings of fact:

- (a) CSIS officials that traveled to Syria told members of the Syrian Military Intelligence that did not want Mr. Arar returned to Canada.
 - (b) CSIS refused to assist DFAIT in its efforts to secure Mr. Arar's return to Canada.
 - (c) CSIS, in proposing language that was not helpful and was counter-productive, impeded the efforts being made by DFAIT to secure Mr. Arar's release.
 - (d) CSIS did not, for political and institutional reasons, want Mr. Arar to be released from Syrian custody.
 - (e) CSIS took active steps to prevent Mr. Arar's release from Syrian custody.
- (iv) Did CSIS continue to forge information sharing agreements with Syria without due regard to Syria's human rights record?**

475. According to the redacted CSIS summary, "CSIS may have to enter into relationships with a foreign agency of a country that has a poor human rights record" for national security reasons. The summary also suggests that CSIS exercises caution in such cases by "closely scrutinizing the content of information provided to, obtained from, the foreign agency and by instituting checks and balances to ensure that none of the security

intelligence information exchanged with the foreign agency is used in the commission of human rights violations.”

Redacted CSIS Summary, para. 28

476. Given the Government’s broad claims of national security confidentiality, counsel for Mr. Arar were precluded from challenging any of the evidence in support of this statement. Nonetheless, the Commissioner must consider whether it is ever appropriate for CSIS to share information with or enter into information sharing agreements with foreign entities that are known or reputed to engage in torture. It is clear that CSIS was aware that, in August 2002, Mr. El Maati complained he had been tortured during an interrogation while in custody in Syria. This was just three months before CSIS traveled to Syria and discussed Mr. Arar with the Syrian Military Intelligence. CSIS was also aware of the human rights record of the Syrian government generally and the Syrian Military Intelligence specifically. Despite this knowledge, CSIS authorized and instructed a delegation to travel Syria in November 2002 to either elicit information or to secure a more permanent information sharing arrangement with the Syrians.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10810 - 10816

477. Although Mr. Hooper testified that CSIS only shares information with regimes that engaged in human rights violations in extraordinary cases, there is no evidence on the public record to explain whether Mr. Arar’s case was considered to be extraordinary by CSIS. The Commissioner must, therefore, make findings of fact about whether CSIS sought to secure an information sharing agreement in the face of credible evidence that the

Syrian government generally and the Syrian Military Intelligence specifically engage in torture. The Commissioner must also make a finding of fact about whether CSIS gave due consideration to the human rights record of Syria before entering into an information sharing agreement and whether such an agreement was appropriate in all the circumstances.

Testimony of Jack Hooper, Transcript of Proceedings, August 25, 2005, pp. 10811

V. PERIOD 4: POST RETURN - OCTOBER 6, 2003 TO FEBRUARY 5, 2004

478. In this period it is the submission of counsel for Mr. Arar that the relevant officials of the Canadian government whose actions should come under scrutiny by the Commissioner are:

- b) CSIS whose officials who might have been involved in the leaks of information to the media and who actively opposed the calling of a public inquiry;
- c) The RCMP and/or members of the A O Canada Investigative Team who might have been involved in the leaks of information to the media and who actively opposed the calling of a public inquiry.
- d) Officials from the Privy Council Office (PCO) and other government departments who were involved in the development of the government's response to Mr. Arar's public statement and his request for a public inquiry into the conduct of Canadian officials in the events that led his arrest and detention in the U.S. and deportation and detention and torture in Syria.

479. We have indicated in our introductory remarks, that we believe that the Commissioner's mandate requires that he consider the conduct of Canadian officials after Mr. Arar's return from Syria. While we acknowledge that the terms of reference do not expressly deal with these matters, the last clause in his terms of reference allows the Commissioner to investigate 'any other circumstances directly related to Mr. Arar that Justice O'Connor considers relevant' with respect to the conduct of Canadian officials. In our view, the conduct of Canadian officials after Mr. Arar's return reflects the ambivalence that is disclosed in the evidence concerning the conduct of officials while Mr. Arar was still in detention in Syria.

(i) Media Leaks

480. While on the one hand, some officials were genuinely pleased that Mr. Arar had returned and welcomed him back to Canada, other unknown officials in the government were concerned of the impact that his return might have on forcing a public accounting for what had happened to him. They were concerned that there might be an accounting for their conduct and were also concerned that their conduct might affect other interests, and in particular U.S. Canada relations and cooperation with U.S. intelligence agencies. These officials engaged in a campaign of clandestine disclosure of information apparently adverse to Mr. Arar in an effort to influence Canadian public opinion and the political leaders to be less sympathetic to Mr. Arar's case.

481. This was done to justify their conduct vis a vis Mr. Arar and also to influence public

opinion against the calling of a public inquiry. The Commissioner ought to infer from this conduct that there was a 'consciousness of guilt'. In our submission this conduct was highly improper and illegal and caused very severe psychological damage to Mr. Arar. Indeed the leaks of information have resulted in one criminal investigation (in the O'Neil matter) and a second more recent acknowledgment that there was a breach of the Security of Information Act with the more recent Travers article but that no investigation would be conducted.

Exhibit P-241

482. This conduct must be considered in the context of all of the evidence and concerns that have been dealt with earlier in the submissions. Mr. Arar, a Canadian citizen was "a peripheral person of interest" and/or a 'potential witness' in a national security investigation. Unbeknownst to him, his name was shared with U.S. authorities and this led to his being put on a watch list. He was detained at Kennedy airport on September 26, 2002 and was deported to Syria on October 8, 2002 over and despite his protests that he would be subjected to torture there. He was held in Syria until October 6, 2003 in inhumane and brutal conditions and was subjected to torture while there. As we have submitted earlier in these submissions the evidentiary record discloses a great deal of ambivalence on the part of Canadian officials concerning efforts to obtain Mr. Arar's release and, although there were some officials who were genuinely interested in obtaining his release, others were not.

483. The leaks of personal information to the media intending to justify the actions of Canadian security authorities are extremely serious. These leaks have irreparably

damaged Mr. Arar's reputation. The leaks of information were intended to undermine Mr. Arar's credibility in the public and also to influence political leaders against the calling of a public hearing. This surreptitious interference in the political process must be condemned. It is not acceptable for the government to argue that because the perpetrators of the leaks are unknown the government and its agencies can not be held responsible for them.

484. We make this submission for two reasons. First while we recognize that the Commissioner may not have information as to who were the authors of the leaks, we would submit that the only reasonable conclusion is that the leaks came from within the security apparatus. Given that the government has claimed national security confidentiality over virtually all of Mr. Arar's file, it is reasonable to assume that only persons with a high level of security clearance within the security apparatus would have had access to Mr. Arar's file and the information contained therein that gave rise to the various leaks to the media.

485. Indeed when one looks at the leaks in their totality we would submit that it is reasonable to conclude that they were part of an orchestrated plan by senior officials within the national security apparatus and not the isolated actions of a few irresponsible actors. We believe that the evidence discloses that the highest levels of the RCMP and CSIS were profoundly opposed to the idea of an inquiry. In such an environment and given the nature of the leaks and the information disclosed, the Commissioner should find that senior officials attempted to use leaks through the media as a mechanism for influencing government and public opinion.

486. In our submission, it matters not that the identity of the perpetrators of the leaks are unknown. What is significant is that the leaks occurred and that the only reasonable inference is that the authors of the leaks are members of the national security apparatus.

ISSUES

487. The issues that arise within the context of this period are:

- a) Did members of the Canadian government, specifically members of the national security apparatus (CSIS, RCMP) leak information from Mr. Arar's file to the media?
- b) If the Commissioner finds that such leaks occurred by officials of the government, what was the purpose of the leaks?
- c) What were the effects of the leaks in terms of their impact on Mr. Arar's reputation?
- d) Why did senior officials with the Canadian government actively oppose the calling of a public inquiry?
- e) Were their actions motivated not out of a desire to achieve a full understanding of the facts of this case, but rather out of a concern over the potential impact a public inquiry might have on Canada U.S. relations?

488. There are numerous leaks of information both prior to and subsequent to Mr. Arar's return from Syria. Although this submission generally deals with the period after Mr. Arar's return we believe it appropriate to deal here with all of the leaks of information. The first

leak of information occurred prior to Mr. Arar's return and in January 2003 when Inspector Killam gave a briefing to Roberta Lloyd and other senior officials of government. Ms. Lloyd testified that while she attended an educational session in Ottawa, Inspector Killam in response to a question from her, implied that all of the facts surrounding Mr. Arar were not in the public domain and that it would not have happened to him if he were innocent

Testimony of Roberta Lloyd, Transcript of Proceedings, pp. 2807 - 2808; 2819; 2870 - 2873

489. Although Insp. Killam denies that his intent was to, suggest that he had confidential information that suggested Mr. Arar was a not innocent, , he acknowledged in his cross-examination that, in fact, this was one possible and reasonable interpretation of the evidence.

Testimony of Inspector Killam, Transcript of Proceedings, August 2, 2005, p. 9307

490. The evidence of Roberta Lloyd on this point the other hand was clear and unequivocal. She clearly stated that she understood from Insp. Killiam's presentation that he believed that Mr. Arar was not innocent and that he deserved the brutal inhumane treatment he received.

491. In our view, this is the first evidence of a leak of information by a Canadian official. We would ask in this regard that the Commissioner find as a fact that a reasonable interpretation of Insp. Killiam's statements are, as Roberta Lloyd indicated in her testimony and that she was telling the truth in this regard We would also ask as a finding of fact that the Commissioner find that the comments made by Insp. Killiam were inappropriate, were

in violation of Mr. Arar’s privacy rights and, indeed, were in violation of his obligation to not disclose national security information.

492. The first significant media leak occurred on July 24, 2003 in the Ottawa Citizen entitled *Terror Threats in Ottawa* by Robert Fife. In this article, an official told the reporter that Mr. Arar “is a very bad guy” who obtained military training at an Al-Qaeda base. In our respectful submission, this is another example of a leak from an unnamed security official, making bald assertions about Mr. Arar’s character and also suggesting that he obtained military training at an Al-Qaeda base. This leak by an unnamed official was clearly designed to influence public opinion, which at that time was running very strongly in favour of Mr. Arar due to the efforts of his wife to obtain his release. By hiding behind a veil of anonymity and not revealing the name of the official neither Mr. Arar or his wife could defend his name against the allegations made through leaks of information.

Motion Record, Vol. I, tab 92, p. 196

493. The second leak of information occurred on October 10, 2003 in a Jeff Sallot article in the Globe and Mail. In this article, an official says that the Americans were interested in Maher Arar because he had once been in Afghanistan. The official went on to suggest that the visit was in the early ‘90s, before Al-Qaeda had established its training camps. Again, this leaked information attempts to link Mr. Arar with Afghanistan in order to justify the activities of Canadian officials.

Motion Record, Vol. 1, tab 33, p. 66

494. The third leak occurred on October 24, 2003 in a CTV news report *Recent leaks in the case of Canadian deported to Syria*. In this news report, senior government officials from various departments claimed that Mr. Arar gave information to Syrian officials about Al-Qaeda, the Muslim Brotherhood and another radical group with links to Bin Laden. The news report went on to say that Mr. Arar provided information about sleeper cells in Canada and four Canadians, Mr. Al Bouchi, Mr. Almalki, Mr. El Maati and Mr. Mohammed Harkat. The source in the news report alleged that Mr. Arar was released because he had provided this information to Syrians and that CSIS had transcripts of the interrogations.

Motion Record, Vol. 1, tab 38, p. 77

495. This report is of serious concern. Again, it links Mr. Arar to Al-Qaeda. It also suggests that he acted as an informant and provided information to the Syrians about persons in Canada, including Mr. Harkat. This information caused grave consternation to Mr. Arar, because he had never mentioned Mr. Harkat during any of his interrogations in Syria but found himself being accused of providing adverse information against him in a public media report. The effect of this information was again to attempt to create a public perception that Mr. Arar was involved in terrorist activities and that he had links to terrorist organizations and to persons involved in terrorist activities.

496. The most significant leak, however, was the one that occurred on November 8, 2003, with Juliet O'Neil's "*Canada's dossier on Mr. Arar*." The article in question indicated that the Canadian government's suspicion about Mr. Arar began when he was seen with Abdullah Almalki. The article goes on to discuss one of the leaked documents - a transcript

of the early interrogations of Mr. Arar in Syria. It should be of note that, based upon the evidence that we now have, we know that CSIS obtained information from Syria on two occasions, one as a result of the papier de bouite that was provided to Ambassador Pillarella prior to his return at the beginning of November. In addition, we now know from the public documents that CSIS attended in Syria around November 20, 2002 and at that time they obtained further information on Mr. Arar, including records of his interrogations. It would appear that the O'Neil article refers to the records of interrogation that were received after the CSIS visit. This document goes on to allege that Mr. Arar was in a Mujahadeen camp in Afghanistan in 1993. Clearly, the purpose of this document was to discredit Mr. Arar in the public view in order to justify the conduct of the RCMP and CSIS.

Motion Record, Vol. 1, tab 50, p. 102
Exhibit P-48, tab 49

497. The next leak was the December 3, 2003 article "*U.S., Canada '100% sure' Arar trained with Al-Qaeda.*" Once again this article suggests that U.S. and Canadian officials are sure that Mr. Arar trained in an Al-Qaeda camp. This article mentions for the first time an association between Mr. Arar and Ahmed Ressam. The article relies on sources that allege that Mr. Arar went to Pakistan in the early '90s and then went to an Al-Qaeda camp in Afghanistan. It also suggested that Mr. Arar might have trained at a camp with Mr. Khadr.

It should be noted that one of the Khadr brothers was interviewed by the RCMP in August 2002 in Afghanistan and denied that Mr. Arar had been there or that he even knew Mr. Arar. The report goes on to quote a senior Canadian intelligence source as saying about Mr. Arar, "This guy is not a virgin." The article also quotes Canadian officials as saying that U.S. authorities have an "extensive dossier on [Mr. Arar] that raises serious questions."

Again, it is abundantly clear that these comments were intended to raise concerns in the public with respect to Mr. Arar and to suggest that, in fact, Mr. Arar was associated with terrorist activity.

Motion Record, Vol. 1, tab 67, p. 138; tab 68, p. 139

498. The last leak was one that occurred during the inquiry. CSIS has acknowledged that there was a leak as a result of the June 9, 2005 article by James Travers in the Toronto Star. The article suggested that CSIS was in Syria to strike a secret deal for the exchange of information. This was not information on the public record. The article goes on to state that the Commissioner had been told “behind closed doors” that Canada’s primary intelligence sources would disappear if it became apparent that information sent to Canada in confidence did not remain confidential. The government has acknowledged that this was a breach of the *Security of Information Act* but concluded that there was no value in instituting an investigation given the large number of people who had access to the information. This leak is different from others in that it appears to be an egregious and flagrant attempt to influence the Commissioner in his recommendations by suggesting that any efforts to place any control on CSIS’s power to share information with foreign regimes would have very negative effects on our national security.

James Travers Article Toronto Star June 9, 2005, Transcript of Proceedings, June 9, 2005, pp. 6363-6376

499. In our respectful submission, these documents clearly establish beyond a doubt that there has been a systematic campaign by officials within the Canadian security apparatus

to leak information to the media with a view to discredit Mr. Arar. The leaks could only come from within the security apparatus because they were the only persons with access to the information. The fact is that to the extent that any of the information contained in the leaks has come onto the public record it has been demonstrated to be true. Indeed, the government acknowledged that the information in both the Travers and O'Neil leaks involved breaches of the Security of Information Act, a clear indication that the information contained in the leaks with from authentic sources,

500. The effect of these leaks has been to paint of picture of Mr. Arar as a person who was actively involved in terrorist activities and who received military training in the Al-Qaeda camps in Afghanistan and was connected to other persons with links to Al-Qaeda. The leaks were also designed to curb public support for Mr. Arar in order dampen public pressure for a full inquiry.

501. Obviously these leaks have had a grave impact on Mr. Arar's reputation. Although the perpetrators of these leaks are not known, and indeed, with respect to the O'Neil article, there is an ongoing criminal investigation to determine the source of the leak, in the submission of counsel for Mr. Arar, this is irrelevant. In our submission, the only reasonable inference that can be drawn from the evidence before the Commissioner is that the authors of the leaks are persons within the Canadian security apparatus. We will not speculate as to their identity but would suggest that they are persons who must have had access to Mr. Arar's top secret files and, therefore, must have had a high level of security clearance. Mr. Arar therefore seeks that the Commissioner make the following findings of fact:

- a) That officials within the national security apparatus, and, therefore, officials of the Government of Canada, intentionally leaked personal top secret information from Mr. Arar's dossier to the media.
- b) The purpose of the leaks of the information was to discredit Mr. Arar in the eyes of the public.
- c) The secondary purpose of the leaks was in order to influence the course of political events by trying to put pressure on the government to not call a public inquiry.
- d) The leaks have had a detrimental effect on Mr. Arar's reputation.
- e) The leaks have also had a serious and grave emotional impact on Mr. Arar by re-traumatizing him.

Government of Canada's Response to Mr. Arar's Return

502. The second issue that emerges within the context of the post-return period is the response of the Government of Canada to Mr. Arar's return. In our submission, it is abundantly clear that the Government of Canada's initial response, instead of attempting to obtain a clear understanding of what happened to Mr. Arar, was to mitigate the political damage. The Government of Canada was acting upon a misguided sense of priorities when it initially rejected a full public inquiry into Mr. Arar's situation.

503. Instead of choosing an approach that was most likely to provide answers as to why a Canadian citizen had been subjected to such gross mistreatment, the Government of Canada prioritized its economic and intelligence relationship with the United States and its

concerns with the logistical implications of an inquiry.

504. It is our submission that the Government developed a communications and political strategy to avoid fully informing the public about their role in Mr. Arar's deportation to Syria. The series of measures the Government of Canada implemented after Mr. Arar's return can at best be described as "half measures" that were incapable of revealing the truth to the public. The three principle measures taken by the Government were

- a) the SIRC report,
- b) the Commission for Public Complaints Against the RCMP report,
- c) the Monterrey Protocol with the United States.

505. The difficulty with all of these measures was that they did not provide any public accounting for what had happened to Mr. Arar. The Government of Canada rejected repeated calls to hold a full inquiry from Mr. Arar, Mr. Arar's lawyers, political leaders, public interest organizations, and the general public. Their response to these requests was to point to the SIRC and Commission for Public Complaints processes already underway. A day after Mr. Arar held a news conference about his detention in New York and deportation to Syria, Mr. Himelfarb wrote a memorandum for the Prime Minister regarding Mr. Arar. During his news conference, Mr. Arar described the inhumane treatment he endured and requested a full public inquiry. The Government of Canada rejects this call and instead recommends supporting the activities of the RCMP Complaints Commission and SIRC as well as "put[ing] in place appropriate arrangements with the U.S."

506. In a later Memorandum for the Prime Minister regarding “The Arar Case and National Security Issues” a full inquiry is rejected again. The government recommends that any broader inquiry will have to wait until the SIRC and the RCMP Complaints Commission reviews are complete. The government also recommends that any broader inquiry should be a non-statutory one. Rob Wright, national security advisor to the Prime Minister endorses a non-statutory inquiry because “[it would] ensure the confidentiality of sensitive government information, which would help to safeguard Canada’s vital security and intelligence relationship with the U.S.”

Exhibit P-48, tab 61

507. The repeated rejections of a full public inquiry make it abundantly clear that the Canadian government was prioritizing its relationship with the United States instead of trying to find out the truth about Mr. Arar’s gross mistreatment. A document in the PCO entitled “ARAR – Future Storyline” demonstrates how safeguarding Canada’s information sharing relationship with the United States took precedence over providing the public with a full account of Mr. Arar’s ordeal. In a very explicit way, the Government of Canada lists their main objectives in “managing the Arar file” as being: Canada/U.S. collaboration on joint law enforcement and national security/intelligence investigations remains uncompromised and .a similar situation to Mr. Arar does not happen again whereby a Canadian citizens detained in the U.S. are deported to a third country without Canada’s prior knowledge; and sufficient review and accountability measures are in place to ensure an appropriate balance between protecting Canada’s national security and the civil liberties of Canadians.

508. The document goes on to describe the importance of cooperation between Canada and U.S. law enforcement and security apparatuses. Instead of a full inquiry, the Government of Canada chose to take a “comprehensive approach” that would not be able to determine Canada’s role in Mr. Arar’s ordeal. A key feature of the approach is that it demonstrates that Canada “will continue to be a willing and responsible partner with the U.S. in the fight against terrorism.”

Exhibit P-48, tab 62

509. In response to letters written by Mr. Arar and the Canadian Bar Association in late November 2003, both urging for a full public inquiry, the Government of Canada once again restated their reliance on the SIRC report and the Commission for Public Complaints against the RCMP.

Exhibit P-48, tab 69

510. The different documents in the PCO clearly indicate that the Government of Canada’s first response was to refer the matter to the Commission for Public Complaints and to SIRC. Obviously, the difficulty with both of these approaches was that they would not provide any public accounting for what had happened. The Government of Canada’s response to Mr. Arar’s return indicates that they were not interested in obtaining a public accounting and getting to the bottom of what happened to Mr. Arar but were more concerned about managing the public reaction to his case and of not creating tensions in Canada-U.S. relations.

511. The SIRC report was an inadequate approach in that it could not provide a public accounting of Canada's role in Mr. Arar's mistreatment. To this day, the vast majority of the SIRC report remains redacted and not available to the public. Given that one of the primary purposes of the call for a public inquiry provide the public with an account of how this could have happened to a Canadian citizen. The SIRC report fails miserably at this aim.

512. The second measure was a Commission for Public Complaints against the RCMP. The Commissioner for Public Complaints has repeatedly stated publicly that she was powerless to compel the RCMP to provide the necessary level of disclosure that would allow her to effectively undertake her mandate.

513. The third measure was the so called Monterrey Protocol. In January 2004, Secretary of State, Colin Power and Minister Bill Graham of the Department of Foreign Affairs entered into a consular understanding through an exchange of correspondence. The impetus for this arrangement arose from Canadian concerns generated by Mr. Arar's case. This consular understanding was to be a non-binding arrangement relating to the involuntary removal of Canadian or US nationals from the territory of the other's state to a third state. This understanding provides for a number of things:

- a) Advice to an agreed upon principal point of contact of an intended involuntary removal to a third state.
- b) promise to consult expeditiously if a request is made for such consultations.
- c) The identification of high level principal points of contact to ensure the timely flow of information about the intended course of action.

Exhibit P-42, tab 791

514. In each case, the intended principal point of contact is the highest level government official in Canada or the United States who deals directly with consular affairs. In Canada, that person is the Director General of Consular Affairs and in the U.S., the Assistant Secretary of State for Consular Affairs of the Department of State. Minister Graham testified that he was alive to the limits of such an understanding and that the preferred option from the perspective of the Canadian Government would have been an outright undertaking by the United States not to deport any Canadian citizen to a third country with that person.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, p. 4323

515. Minister Graham testified that the United States declined to enter into a more binding arrangement preserving its right to ultimately act in its own security interests. As a result, the best that could be achieved was an arrangement contemplating consultation. When asked whether U.S. unilateralism raised serious questions about the worth of any such understanding, Minister Graham said that consultation between the U.S. and Canada in such a case would send off alarm bells in Canada and would readily result in high level contact including contact between the Prime Minister of Canada and the President of the United States. Furthermore, Minister Graham testified that there were a whole host of immediate responses that could be brought to an "action level" that he believed would make it virtually most "unlikely" that the U.S. would go ahead with such a removal in the face of a Canadian government objection. Minister Graham acknowledged that if the U.S.

were absolutely determined to go ahead with such a removal, it could not be stopped but that on the whole, he believed that the understanding provided effective protection for Canadians.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4324

- 4325

516. We urge the Commissioner to find as a fact that the arrangement as framed fails to address the circumstances of persons who have a right to enter Canada and reside here. Canadian citizens, landed immigrants of Canada or protected persons have these rights and should be expressly included in the understanding. At a minimum, this is necessary to protect Canadians and those with the right to reside in Canada from being involuntarily removed to a third state by the US. Furthermore, we urge the Commission to recommend that the Government of Canada return to the bargaining table with the U.S. to try and obtain a binding agreement preventing the involuntary removal of Canadian citizens, permanent residents and protected persons to countries where there is a risk of torture. Only then will there be adequate protection for Canadians against current U.S. policies which operate to remove persons to countries where there is a risk of torture. The existence of assurance from the third state should not operate to make any such involuntary removal acceptable. In sum we believe that the so called Monterrey Protocol fails to provide the kind of protection against deportation to torture that Canadians are entitled to expect both because it ignores the plight of non citizens who are resident here and also because of its non-binding nature.

517. However, the Minister's testimony as to his confidence in the processes of

consultation at high levels speaks loudly to what might have happened had those discharging their consular duties to Mr. Arar in New York responded to the information that they were given about Mr. Arar's possible removal to Syria. In effect, Minister Graham asserted in strong terms that he had a *bona fide* belief that had he been notified when the U.S. was considering removing Mr. Arar to Syria, active representations could have prevented that.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, p. 4923

518. These remarks raise the stark question of whether Mr. Arar's removal to Syria would have been prevented if the Minister had been properly informed. In light of this admission by Minister Graham we urge the Commissioner to find as a fact that such notification did not occur and further that if it had, Mr. Arar's rendition could have been prevented. This position is more fully developed elsewhere in our submissions.

RECOMMENDATIONS

519. In our submission what this response highlights is that there must be in place an effective independent oversight mechanism available to Canadian citizens and residents. If such an independent oversight mechanism had been in place, with full powers to investigate individual complaints of wrong doing by the RCMP and CSIS and most importantly with the power to compel production of documents and witnesses and to recommend compensation and to report publicly, then the issue of the appropriate response to Mr. Arar's situation would not have arisen. The fact that the government was motivated by political considerations to resist an open and fair process which would allow

for an accounting of what had happened in Mr Arar’s case highlights the need to take any future possible cases out of the political arena. While we understand that the issue of oversight is to be dealt with in Part Two of your report, we believe that the response of the PCO and others to Mr. Arar’s call for a public inquiry highlights the need for a mechanism which in addition to acting as a general oversight body would be charged with receiving and investigating individual complaints of wrong doing levelled against the RCMP with full power to order production of all documents and witnesses and with a power to recommend compensation in appropriate cases.

(ii) Information flowing to Ministers of the Crown

520. As Professor Peter Hogg observes, “Responsible government is probably the most important non-federal characteristic of the Canadian Constitution.” Its central feature is the Prime Minister and all other Ministers are members of Parliament, elected as representatives of the people of Canada. Responsible government is, therefore, the core of a parliamentary democracy as it is the vehicle through which effective political power is exercised by elected officials.

P. Hogg, *Constitutional Laws of Canada* (Toronto: Thomson Carswell, loose leaf edition) at p. 9-3

521. Accountability for good governance is achieved because Ministers are responsible to Parliament. Ministers must answer to the Parliament of Canada for their own actions and the actions of their Department, which are undertaken in their name and should resign when serious case of maladministration occurs under their leadership. The system depends not only on an effective chain of command, but also the accurate, complete and

timely flow of information from civil servants up to the Minister. A lack of effective communication results in an inability of Ministers to fulfil their obligations to Parliament. Consequently, it is an essential function of a Parliamentary democracy that Ministers be provided and act only upon accurate, timely and reliable information as to the workings of their ministry.

Constitutional Laws of Canada, supra at pp 9 -7 to 9-11

(a) Was the Minister of Foreign Affairs, Mr. Bill Graham, adequately and accurately briefed?

522. Minister Graham was generally briefed with information that was transmitted up through departmental channels to his Assistant Deputy Minister and then to the Deputy Minister. In the alternative, if there was a "direct political engagement", a briefing took place through Mr. Fry who dealt with consular issues on a day-to-day basis.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, p. 4088

523. By October 12, 2002, the case of Mr. Arar was already in the press. Muslim groups in Canada pointed to a concern that he was being returned to Syria where he faced a "significant risk of torture". In particular, someone known to Mr. Arar pointed out that he had not fulfilled his military obligations in Syria.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, p. 4096

524. Mr. Graham was preparing at that time for a luncheon meeting with the U.S. Ambassador to Canada, Mr. Paul Cellucci, scheduled for October 15, 2002. In preparation for this meeting with the American Ambassador, the Minister was briefed. The briefing note

was prepared by Mr. Gar Pardy. In substance, it informed the Minister generally of Mr. Arar's removal from the U.S. and called upon the Minister to raise Mr. Arar's circumstance with the American Ambassador. Mr. Pardy brought to the Minister's attention that the information received from the U.S. had been neither timely nor complete. Furthermore, Mr. Pardy informed the Minister that they had been unable to locate Mr. Arar in either Syria or Jordan. At the luncheon meeting, Minister Graham was told by the U.S. Ambassador that the U.S. INS had acted properly in deporting Mr. Arar to Syria and "you should talk to your local people who may know the reasons". At the meeting, the Minister testified he certainly felt that Mr. Cellucci was making allegations that he had no way of either analyzing or being able to refute. He made allegations both in respect of Mr. Arar's conduct which the U.S. regarded as justification for his removal to Syria and also allegations about the fact that Canadian authorities have been complicit in the decision to send him abroad. Minister Graham complained to members of his office that he had no independent way of verifying or refuting these observations.

Exhibit P-42, Vol. 1, Tab 74

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4102 - 4106

525. The Minister's frustration with this lack of information was only exacerbated in his dealings with Secretary of State, Colin Powell who consistently asserted that somebody in Canada had given the "go ahead" to deport Mr. Arar to Syria. Secretary of State Powell persisted in this position until even after Mr. Arar returned home. In fact, Secretary of State Powell commented that Minister Graham "wasn't in the know". As a result, Mr. Graham asked for a thorough briefing through the Solicitor General who had responsibility for CSIS

and the RCMP.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4106 - 4108
Exhibit P-84, p. 53.

526. This briefing never took place as the RCMP refused to share any of the operational details that gave rise to information about Mr. Arar even with the Solicitor General. Their position was premised on their concern that there be no political interference in the operations of the police.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, p. 4107
Exhibit P-83, tab 2, p. 203

527. Minister Graham acknowledged that while he would have been more comfortable with a higher level of information, he was not prepared to say he needed the details of all operational information. Wherever the line is to be drawn to ensure there is no political interference in ongoing investigations, it is obviously also essential that the Minister be provided the information necessary for him to discharge his functions. In meetings with his U.S. counterparts, particularly the Secretary of State, Colin Powell, it is clear that the Minister felt that the Secretary of State had the upper hand. Because of National Security Confidentiality assertions, it is very difficult for counsel on behalf of Mr. Arar to try and pinpoint where the line is to be appropriately drawn. We are neither in possession of the operational information nor the details of the conversations that the Minister had with his counterparts. As a result, it is apparent that we can only draw to the Commissioner's attention our deep concern that the role played by Ministers of the Crown who are

supposed to be accountable for the discharge of their functions should not be undermined by artificial barriers.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4141 - 4143

528. On the basis of this evidence, the Commissioner ought to make the following findings of fact:

- (a) Minister Graham was at a significant disadvantage in dealing with his counterpart, the Secretary of State in the US and the Ambassador because of the absence of information.
- (b) In the circumstances of this case the RCMP's refusal was unreasonable and its objection based on the ill-conceived application of the principle that such a sharing would result in political interference. On the record before this Commission of Inquiry no such inference of political interference is possible.

(b) Failure to brief the Minister on INS statements to Mr. Arar

529. The Minister testified that he was generally aware that consular staff had made contact with Mr. Arar, met him and believed he had retained counsel. However, at no time during this early stage was the Minister informed that on several occasions while in New York, consular staff were told by Mr. Arar's family and by Mr. Arar himself that the INS had told him that he could be deported to Syria.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, p. 4126

530. Furthermore, the Minister was never told that while Mr. Arar was detained in New York, that an INS official had informed consular representatives that the case was of

extreme seriousness and the matter should be raised with the Ambassador in Washington who could then raise it with officials in Washington D.C.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, p. 4128

531. Minister Graham was asked by Commission counsel whether he would have directed his consular officials in New York to have acted differently if he had been furnished with the information that Mr. Arar had been informed by INS of his possible deportation to Syria and further that an INS official had conveyed to consular representatives that this matter should be taken to its highest levels and brought to the Canadian Ambassador in Washington. In reply, Minister Graham asserted that had he had the information indeed he would have acted differently. He was, however, only prepared to say this was a matter of hindsight and he declined to criticize the consular officials involved.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4138 - 4140

532. Admittedly, there is a speculative quality to any assessment of whether the Minister, armed with accurate information, could have interceded to make a difference. The Minister declined to hold consular officials to what he described as "a standard of perfection". Nevertheless, it is important to assess the failure to provide him with information against his conclusion that the Monterrey Protocol provides protections to Canadian citizens which would prevent their removal to a third country where they were at risk of torture because consultation and political dialogue about such a removal would likely prevent it. If the Monterrey Protocol is adequate protection, it is difficult to see how the information provided about Mr. Arar's possible deportation to Syria would not have had the same effect if taken

seriously. Such information could have stimulated discussions at the highest level if in fact the Ambassador and others had been involved prior to Mr. Arar's removal.

(c) CSIS Visit to Syria

533. Minister Graham was also not informed, despite documents indicating the contrary, about the visit by CSIS in November 2002. CSIS visited Syrian Military Intelligence on or about November 21 and 22, 2002. While the documentary record suggested that a proposed phone call to discuss Mr. Arar with the Syrian Foreign Minister was delayed because of the CSIS visit, the Minister denied that any such accommodation occurred. He, however, could not recall why the telephone call was in fact not made in November 2002.
Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4161 - 4163

534. The issue of whether the CSIS visit interfered with the discharge of the Minister's efforts to communicate to the Syrians Canada's desire to have Mr. Arar returned is again one which counsel for Mr. Arar has difficulty addressing. Minister Graham quite properly said that the issue of whether he should have known or not may depend on the purpose of the CSIS visits. If there was an impact on the work being undertaken by the Minister or his Department, he would have expected that the Director General of CSIS to speak with the Deputy Minister.

Exhibit P-42, Tab 218
Exhibit P-134, Tab 8

535. We do know, through various admissions made in the course of the Inquiry which touch upon the CSIS visit that the CSIS employees who spoke with Military Intelligence "may have spoken about Mr. Arar". If this was the case, the Minister should have known the intentions of CSIS and should have been in a position to provide direction as to whether

or not such a visit was timely. While the documentary record suggests that the Minister chose to permit the visit to go forward, the Minister denies this. On behalf of Mr. Arar, we urge the Commissioner to find as a fact that Minister Graham did not know of the intended visit and did not approve it. Furthermore, we ask the Commissioner to find that in these circumstances there was a real failure to communicate appropriately to the Minister of Foreign Affairs important information that undermined his pursuit of Mr. Arar's release and return to Canada.

Transcript of Evidence of Proceedings, June 29, 2005, p.10259

(d) The Failure to Provide Accurate Consular Information

536. The Minister was generally aware of Syria's human rights record and the inclination of the regime to repress any form of internal dissent. He was aware of the Syrian record with the Muslim Brotherhood and knew the allegation facing Mr. Arar that he was a member of this Brotherhood, which raised questions about his treatment.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4114 - 4115

537. At the time of seeking consular access to Mr. Arar in Syria, the Minister learned of other Canadians (Mr. El Maati and one other), who were denied access to Canadian Consular Services. He later was informed about the allegations that Mr. El Maati had been tortured while in Syria.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4115 - 4116

538. On October 23, 2002, a backgrounder providing advice to the Minister was prepared

following Mr. Arar's first consular visit. This backgrounder stated:

Mr. Arar appeared to be healthy. We learned that he had been detained in the U.S. for two weeks before being transferred by private plane to Jordan. It was not clear from the conversation how long Mr. Arar had been in Syria, given that the Syrian officers intercepted the questions.

This advice is simply not accurate and we ask the Commissioner to make this finding. The consular report prepared by Mr. Martel made it clear that Mr. Arar reported he had only been in Jordan a few hours and had been in Syria, held *incommunicado*, from October 8th to October 23rd, when the consular visit occurred. Furthermore, the statement that Mr. Arar appeared to be healthy ought to have been qualified to reflect the reality of the first consular visit where, among other things, Mr. Arar appeared submissive and entirely under the control of his Syrian jailers.

Exhibit P-42, Tab 129, p.7

Exhibit P-42. Tabs 130 and 131

Testimony of Minister Graham, Transcript of Proceedings, June 2, 2005, pp. 4130 - 4133

539. Indeed, when Minister Graham testified he was asked to compare the actual record of the October 23 consular visit with the optimistic portrayal of that visit in his briefing materials. He stated that he would not have said that Mr. Arar appeared to be healthy upon reading the note. Instead, he said:

I would have said we are not in a position at this time comment on his condition. That is what I would have said. But we look forward to future consular access to be able to work on making sure that he is being properly treated, something along those lines, I think would have been more responsive.

Testimony of Minister Graham, Transcript of Proceedings, June 2, 2005, p. 4903

540. The significance of this cannot be understated. Mr. Arar was held by Syrian Military

Intelligence in circumstances where a known human rights record included the existence of *incommunicado* detention and torture particularly during the initial phases of detention when information was sought from the detainee. The Minister's own department, in particular, Mr. Gar Pardy, the Director General of Consular Affairs, suspected Mr. Arar had been subjected to aggressive interrogation or torture during the period of his "disappearance." Furthermore, this suspicion could only have been increased when the Ambassador reported his conversation with Syrian Military Intelligence wherein he was informed that Mr. Arar had admitted to having terrorist connections in the first few hours after arriving in Syria on October 22, 2002.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4130 - 4135

541. While the Minister did not dispute that consular officials, in particular Mr. Gar Pardy, tried to get this message to his office, it is clear that he has no specific recollection of receiving it and there are no documents that record that this message was sent in written form to the Minister. While admittedly the Minister's focus was on both identifying where Mr. Arar was and obtaining consular access to him, it is submitted that a much greater urgency would have been felt had this information been clearly placed with the Minister. It could have guided, and indeed it is submitted would have guided, his contact with the U.S. officials, the Syrian officials as well as his Cabinet colleagues, one of which had authority over both CSIS and the RCMP. As Minister Graham stated, "it certainly would have raised alarm bells and pushed the urgency element of what we were trying to do. There is no question about that."

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4135 -

4138

(e) The August 14, 2003 Consular Visit

542. On July 23, 2003, Mr. Arar's wife wrote a letter to the Prime Minister and sent a copy to Minister Graham. In this letter, she reported that the Syrian Human Rights Committee had information that Maher Arar had been tortured in Syria. Shortly thereafter, a press conference was convened disclosing the allegations of torture as described by the Syrian Human Rights Committee and requesting that the Government of Canada recall the Canadian Ambassador to Syria.

Exhibits P-48, tab 21
Exhibit P-42, Vol. 5, Tab 496

543. As a result of these allegations, Minister Graham sent his Assistant Deputy Minister, John McNee to meet with the Syrian Ambassador to Canada, Ambassador Arnous, to express the Government's concern about the allegations of torture that were appearing in the media.

Exhibit P-42, Vol. 6, Tab 521
Testimony of Minister Graham, Transcript of Proceedings, May 30, 2002, pp. 4276 to 4277

544. On August 14, 2003, Minister Graham was on his way to give a press conference about William Samson. As he walked to the press conference, he was informed that there was breaking news about Mr. Arar and received a briefing describing the consular visit Mr. Arar had received on August 14, 2003 and the conclusions drawn by Mr. Leo Martel. As a result, the Minister said to the media that Mr. Arar had been visited by consular officials and that :

we have been assured that he is in good physical condition. He personally, totally rejects all allegations of torture. He was interviewed independently by our consular officials and he stated that his condition is better than it was before we started to intervene on his behalf.

Exhibit P-42, Vol. 4, Tab 405

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4280 - 4281

545. The information conveyed in the press conference was clearly erroneous. Minister Graham attributed this to misunderstanding his briefing but did indicate that he had information, which was confirmed to him at the time, that there was no doubt that Mr. Arar was not being tortured. Furthermore, he was told that Mr. Arar had had an opportunity to make statements to consular officials in the absence of the General who usually attended the entire consular session. Again, the Minister was told that Mr. Arar personally rejected all allegations that he had been tortured. When Mr. Arar returned in early October 2003 and publicly described his torture at the hands of Syrian Military Intelligence during the first two weeks of his interrogation, numerous efforts were undertaken in the Department to clarify and rebut any suggestion that consular officials were alive to the conditions of Mr. Arar's confinement and his treatment.

Testimony of Minister Graham, Transcript of Proceedings, May 30, 2005, pp. 4281 - 4283

546. As developed earlier in these submissions, there is no suggestion that Mr. Martel had an opportunity to speak privately with Mr. Arar on August 14, 2003. Furthermore, there is evidence that Mr. Arar told Mr. Martel that he had been mentally destroyed and that he was being detained in a cell that was 3 x 6 x 7. It would appear that what was conveyed to

the Minister and then passed on by the Minister at this press conference was inaccurate. We ask the Commissioner to find this as a fact.

547. On the basis of these submissions and the public evidence, the Commissioner ought to find that this is a case of extraordinarily poor communication throughout the Department of Foreign Affairs as to the true circumstances surrounding Mr. Arar's treatment in Syria. Had these true circumstances been known and used to inform the decisions of the Minister as to the appropriate steps to take in Mr. Arar's case, it is submitted that a different course of action would have been taken that would have resulted in his release from detention on an earlier date.

(f) Were the Commissioner of the RCMP and the Solicitor General briefed in an accurate and timely fashion?

548. The Solicitor General testified that he was not provided with a full and detailed briefing about Mr. Arar's case until November 2003, after he was released from custody in Syria. There were a number of issues in this case which required consideration and direction from the Solicitor General. It would appear that the Solicitor General was not told that the RCMP refused to share operational details with DFAIT that would have assisted them in discharging their consular mandate. It also appears that the RCMP offered to work with the Syrian Military Intelligence, through the sharing of information without informing the Minister. It is also clear that he was not consulted on whether the traditional caveats placed on information that is shared with foreign police and security intelligence agencies were to apply in the wake of the terrorist attacks of September 11, 2001. Finally, although

the Solicitor General was generally aware of the discussions about a letter being sent to the Syrian authorities, he was not provided with a detailed briefing about this initiative. As a result, important policy issues were not brought to his attention and were “masked” as operational matters. The failure to properly brief those who are politically accountable to Parliament and who are responsible for providing leadership to their departments constitutes a serious failure in this case.

Testimony of Wayne Easter, Transcript of Proceedings, June 3, 2003, p. 5153 - 5156; 5215 - 5216

549. In November 2003, the Solicitor General issued a Ministerial Directive dealing with responsibility and accountability on National Security investigations which states, *inter alia*, as follows:

- E. The Minister is accountable to the Parliament of Canada for the RCMP. The Commissioner, in turn, reports to and is accountable to the Minister.
- F. As part of the accountability process, the Minister will be advised or informed regarding certain RCMP investigations with respect to matters that fall under subsection 6(1) of the *Security Offences Act*, and investigations related to a terrorist offence or terrorist activity, as defined in section 2 of the *Criminal Code of Canada*. The Commissioner of the RCMP shall exercise his judgment to inform the Minister of high profile RCMP investigations or those that give rise to controversy.

This is insufficient. It is inappropriate to leave to the discretion of the Commissioner of the RCMP whether to provide any details of an investigation to the Minister, and if so, what details will be provided.

Exhibit P-12, tab 24

550. The Commissioner ought to recommend that the RCMP has an obligation to provide a timely and detailed briefing on all high profile National Security cases to the Solicitor General. This cannot be left to the discretion of the Commissioner of the RCMP.

551. In addition, the Commissioner of the RCMP was provided with fundamentally inaccurate information about this case. For example, in a Briefing Note dated April 30, 2004, at the time of the negotiations around the letter, the Commissioner was told, *inter alia*, the following:

ARAR became a subject of interest during the "A" Division investigation (Project A-OCANADA) into suspected Al-Qaeda...ARAR was approached by members for an interview but refused. Shortly thereafter, ARAR moved his family to Tunisia.

...

ARAR remains in Syrian custody. He was interviewed by the Syrians and volunteered the had received training at the _____ camp in Afghanistan.

This report was inaccurate in a number of material respects. First, Mr. Arar did not refuse to be interviewed by members of Project AOCANADA. In fact, he agreed to be interviewed in the presence of his counsel and under certain conditions. It was the RCMP who decided that the conditions were unacceptable. Second, Mr. Arar did not move his family to Tunisia. Rather, he was vacationing there with his family. Finally, Mr. Arar did not "volunteer" any information to the Syrians. As set out above in greater detail, by April 2003, it was clear that the Syrian Military Intelligence was controlling and dictating what Mr. Arar said. There was also ample evidence that his confessions might be the product of torture. In the circumstances, any statement given can hardly be considered voluntary.

Exhibit P-83, tab 3, p. 32

Testimony of Inspector Cabana, Transcript of Proceedings, June 29, 2005, pp. 7892

Testimony of Gary Loeppky, Transcript of Proceedings, July 28, 2005, pp. 8818 - 8819

Testimony of Michael Edelson, Transcript of Proceedings, June 16, 2005, p. 7306 - 7307

VI. CONCLUDING REMARKS

552. Given the time constraints imposed on counsel in preparing these submissions it is not possible for us to summarize all of the findings and recommendations that we believe should be made by the Commissioner. However, there are certain key findings which we would like to highlight.

553. While we are aware that the question of Mr. Arar's involvement in terrorist activities was not directly part of the Commissioner's mandate, we believe that it has become so as a result of the evidence that has been placed on the public record or leaked to the media by government officials. The fact is that the public evidence of the position taken by the RCMP and CSIS concerning the wording of the letter that Gar Pardy sought and their insistence that the letter not indicate that there was 'no evidence' that Mr. Arar was involved in terrorist activities has clearly put this question before the Commissioner. The Commissioner has received all of the evidence *in camera*. Mr. Arar is entitled to a finding from the Commissioner as to whether or not Mr. Arar is a terrorist or has engaged in terrorist activity. Anything short of this will leave Mr. Arar under a perpetual cloud and will make it impossible for him to get on with his life.

554. We are also aware that this Commission of Inquiry only deals with the case of Maher Arar. Having said this, the public evidence makes it clear that the case of Maher Arar is

inexorably linked with those of Abdullah Almalki and Ahmed El Maati. The Commissioner has accepted and filed the two chronologies. The disturbing allegations contained in the chronologies give rise to the suggestion of a pattern of conduct by Canadian intelligence agencies and the possible use of Syria and other undemocratic regimes as proxy torturers. This needs to be fully investigated. While we understand that this goes beyond the mandate of this Commission of Inquiry, we would urge the Commissioner to recommend that an independent fact finder be appointed to investigate and report on the serious allegations contained in the chronologies.

555. We believe that the evidence before the Commissioner discloses, at minimum, serious incompetence and quite possibly the direct responsibility of Canadian officials in what happened to Maher Arar. From the very genesis of the AOCANADA investigation it is clear that the decision to transfer the CSIS files to the RCMP was ill considered and in error. Deputy Director Hooper acknowledged that it was done in the aftermath of 9/11 and that in retrospect it might not have been the best decision. Almost four years after the transfer for the purposes of conducting a criminal investigation no charges have been laid. Worse still, three of the persons who, in one way or another, were subjects of the investigation were detained and tortured in Syria.

556. The composition of the AOCANADA team is another matter of serious concern. Officers with no experience in national security investigations and no understanding of the Muslim religion and cultural mores were hastily cobbled together to become an investigative team. It is hardly surprising that the investigation has not produced results.

557. The lack of oversight by the C.I.D. of the investigative team is another glaring problem. C.I.D. was overwhelmed and understaffed. It did not have the capacity to properly carry out its supervisory mandate. In such a context, errors were inevitable.

558. In this atmosphere, it is hardly surprising that errors and misunderstandings occurred. The lack of clear understanding of who was in charge of the investigation and of whether 'caveats were down' is the clear product of this atmosphere. The consequences of this were the "data dump" and other unauthorized sharing of information with the U.S. authorities.

559. Clearly, the RCMP and CSIS, the two organizations now directly involved in national security investigations ought to have been aware of the new post 9/11 reality and of the new tactics of the U.S. authorities in their so called "war against terrorism". This understanding ought to have led to an awareness of the possible consequences of sharing information with the U.S. and other regimes which as Deputy Commissioner Loeppky aptly put, "use different tactics than Canada in the war on terrorism".

560. What is of even greater concern is the continued lack of understanding of the need for care in sharing of information on the part of the RCMP given that both Inspector Cabana and Sergeant Roy indicated that they did not see any difficulties in sharing information with Syria, despite the obvious risk that this might lead to the torture of Canadians in their custody. Given this, we believe that it is essential that the Commissioner make clear

recommendations on the manner in which information should be shared with regimes known to engage in torture, and indeed if such sharing should be permitted at all.

561. We wish to make it clear that our concerns about the sharing of information are not restricted to the RCMP. Although both former Director Elcock and Deputy Director Hooper acknowledged that information should only be provided to regimes that engage in torture if there is an imminent threat, Deputy Director Hooper suggested that he had a more elastic view of what might be considered an imminent threat. Indeed, although we are not privy to any of the *in camera* evidence about what was the nature of the contacts between CSIS and Syrian intelligence, the mere fact that there was such contact during a time when two Canadian citizens were detained and under investigation gives us cause for grave concern. Undoubtedly the Commissioner has the full picture as a result of his review of the *in camera* evidence. We will not repeat our submissions on this point here but wish merely to indicate that we believe that the Commissioner ought to carefully consider how a proper balance can be maintained between Canada's needs for obtaining intelligence and our need, as Justice Minister Cotler recently put it, to not be complicit in torture under any circumstances.

562. When we consider what happened to Maher Arar, we believe that it is obvious that his personal details ought not to have been shared with the U.S. We believe that this situation was compounded when the RCMP decided to continue to cooperate with U.S. authorities during his detention. The lack of coordination between CSIS, the RCMP, and DFAIT while Mr. Arar was in detention was fatal to any efforts to obtain his release. The

failure of DFAIT to act on the clear signals that Mr. Arar was at grave risk of being sent to torture is unforgivable.

563. The role of consular officials while Mr. Arar was in detention is very disconcerting. The lack of understanding of Mr. Martel and Ambassador Pillarella of the risk of torture that Mr. Arar was facing, their failure to see the obvious signs when they were presented to them, the failure to report objectively to senior officials what was happening undoubtedly had an impact in prolonging Mr. Arar's detention. In terms of Ambassador Pillarella's role, we believe that the evidence discloses that he was more concerned about cultivating his contacts with Syrian military intelligence and promoting intelligence sharing than he was with protecting the life of a Canadian citizen.

564. Worse still, the persecution did not cease when Mr. Arar returned to Canada. The leaks of information designed to discredit Mr. Arar and to influence the political process, including the public debate, were unconscionable. They have only exacerbated the emotional impact of the torture of Mr. Arar and seriously undermined his recovery and re-integration into the community.

565. In light of the above, it is submitted that the Commissioner recommend that a mechanism be established to assess the emotional, psychological and economic damage to Mr. Arar and his family with a view to recommending compensation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2005.

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